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79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1979

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INTRODUCTORY STATEMENT

Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 604 F.2d 504, and the unreported findings of fact and conclusions of law of the District Court, are reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1979. A timely petition for rehearing and rehearing *en banc* was denied on December 6, 1979, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Can the annual exclusion *solely* on account of race of hundreds of black children and not a single white child from two integrated high schools be justified by a school board's stated purpose of preventing white flight, where the program effectively denies an integrated education to most of the black children who are excluded?

2. Does a school board's alleged purpose to preserve two schools as integrated either (a) justify an explicit racial classification which imposes the burdens exclusively on black children, or (b) preclude strict judicial scrutiny of the actual purpose and effect of the classification or the board's failure to adopt less discriminatory alternatives which equalize the burdens between blacks and whites?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

20 U.S.C. §1703(c):

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> > "(C) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;"

STATEMENT OF THE CASE

At issue in this case is the legality of racial quotas allegedly designed to preserve racial balance at two schools in a generally segregated school system, where those quotas place the entire burden of integration on blacks and none on whites.

The Background of the Quota Plans

Public schools in the City of Chicago are principally organized on a neighborhood school basis, and exhibit a pattern of substantial segregation. In 1976, for example, 79% of Chicago's public elementary schools and 67% of its public high schools had student bodies which were more than 85% majority or minority (Pl. Ex. 2). Despite considerable pressure from the Illinois State Board of Education to eliminate segregation, the Chicago Board has refused to adopt any mandatory measures to desegregate.*

The racial quotas involved in this case were adopted at two public high schools on Chicago's far south side—Gage Park High School and Morgan Park High School. The attendance areas for these schools are generally speaking located between the all-black inner city schools to the east, and predominantly white schools to the west. (Pl. Exs. 2, 36).** Although racial quotas are applied to certain special "magnet" schools which are not operated on a neighborhood basis, black children living in the Morgan Park and Gage Park areas are the *only* children in the City of Chicago excluded from their neighborhood schools on account of their race. (*Johnson,* R. 9, ¶18 at 10-11).

The racial quota for Gage Park High School was adopted by Respondents in May, 1975, and established a 48% black, 42% white, 8% Hispanic and 2% "principal's option" school-wide quota for the school. The Morgan Park quota,

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* These facts are generally known in Chicago and are set forth in the Chicago Board's Report, *Access to Excellence, Recommendations for Equalizing Educational Opportunity,* at xv, xix, which both parties cited to the Court of Appeals.

** These white schools are Kelly (78.1% white in 1976), Kennedy (89% white), Bogan (97.4% white), Hubbard (93.4% white), and Curie (76% white) (Pl. Ex. 2).

adopted the following year, established a 50% black —50% white quota for each entering class. The quotas were adopted over the express and determined opposition of the black community (Pl. Ex. 74 at 40-42, 44-47) (Morgan Park), and the specific ratios were selected at the urging of the white community. (Def. Ex. 35, at 29, 37) (Gage Park). In each case, the Board's *stated* purpose for the quota was to reduce overcrowding and prevent increasingly black enrollments. (A-36, ¶12). As the District Court explicitly found, the ceiling on black enrollments was necessarily set at a lower level than that at which blacks would have been admitted but for the quotas. (A-36, ¶12). The quotas were thus designed to exclude black children from Morgan Park and Gage Park High Schools.

The quotas had their intended effect. In three years, over 1630 black children were excluded, and not a single white child. (A-47, ¶42). In fact, the admission of every white child was apparent from the moment the quota results were first announced. (A-37 to A-39, A-45). The quota plans also achieved their objective of attaining the prescribed quota levels, since increasing numbers of black children were excluded each year until the quota levels were satisfied. (See A-40, ¶26). However, there was no evidence that the quota plans were effective in reversing the decline in white enrollment at the two schools. To the contrary, from 1975 to 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071. (Compare Pl. Ex. 1 with A-40, ¶26).

At the same time, the quotas resulted in an effective denial of an integrated education to the excluded black children. When the plans were originally adopted, the Board provided that excluded black children could attend any one of a list of so-called "under-utilized" public high schools,

via public transportation. (A-39 to A-40, ¶24). The only under-utilized schools with significant white enrollments were located on the north side of Chicago, at least 11.4 miles from Gage Park and 18 miles from Morgan Park. (A-41, ¶28). As a result, virtually all the black children excluded from Morgan Park or Gage Park High Schools in 1975 and 1976 attended schools which were all or predominantly minority, and not a single child attended any under-utilized white school made available by the Board. (A-42 to A-44, ¶¶30-32). The Board's indifference as to excluded black children's ability to obtain an integrated education is underlined by its failure even to investigate whether excluded black children were attending integrated schools. (R.16, ¶1(d) at 2; R.25, Ex. 2).

The action below

Petitioners are black elementary and high school students who reside in the Morgan Park or Gage Park attendance areas. They brought the action below seeking an injunction against the quota plans and damages.

This case was presented to the trial judge for decision on an entirely documentary record. No Board member or representative testified as to the rationale for the quotas, and no demographer testified as to either past patterns or future projections of racial change. The sole evidence in support of the quotas were statistics showing past racial change in Gage Park and Morgan Park and in three other schools, Fenger, Orr, and Bowen. (e.g., A-21). But the Record equally contains evidence that nearby schools like Kenwood remained constant from 1970-76 at 26% white (Pl. Exs. 2, 50) and absolutely no explanation of why Gage Park and Morgan Park were more like Fenger than Ken-

wood.* There was also no evidence that the quotas would be effective in preventing the decline in white enrollments. In short, on the critical points of the need for the quotas, their rationality, and anticipated efficacy, there was little more in the Record than the *ipse dixit* of the Board.

Upon submission of all the evidence, the District Court announced that it was prepared to find the quota plans unconstitutional, but would reserve ruling pending any modification the Board might seek to propose. The Board thereafter modified the plans to provide free bus transportation for excluded black children to predominantly white or integrated schools principally on the north side of Chicago. This option involved a 1½ hour bus trip each way. (R.71, Beverly Review, September 14, 1977). In 1977, only 102 of the 1632 excluded children availed themselves of that option (A-47, ¶42). In 1978, after the exclusion of several hundred additional children, the Board reported that 359 students were participating in the busing program (A-14). Recent reports by the Board for the 1979 school year indicate that after another year of exclusion, the number of black children availing themselves of the busing option has dropped to 285.**

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* The Record also shows that some of the "under-utilized" schools made available to excluded black students *themselves* exhibited rapid change during this period (Lakeview went from 64.2% white to 43.6% white and Senn from 61.5% white to 44.0% white. Pl. Ex. 2, 50)—but contains no explanation of why a board purportedly intending to prevent racial change chose to bus excluded black students to schools already undergoing racial change. And nothing in the Record explains racial change in particular neighborhoods in the context of overall enrollment patterns in Chicago in which the white percentage dropped from 34.6% to 24.9% from 1970-76 (*Id.*).

** Chicago Board of Education, "Access to Excellence, Summary of Continuing Programs," Jan. 31, 1980, at 5.

The District Court held that although the original quota plans were unconstitutional, the post-trial modifications adopted by the Board cured any constitutional defects. (A-48, ¶¶1, 3). The District Court also found that these modifications to the quota plan "would not have been adopted but for the efforts of plaintiffs and their counsel" (A-48 to A-49, ¶6).*

The Court of Appeals affirmed in all respects. It began by noting that, as a racial classification, the quotas would be subject to the compelling state interest test, even though they were purportedly adopted for the benign purpose of preserving integration (A-19 n.); but that this test was satisfied because the preservation of integrated schools was *ipso facto* a compelling state interest (A-20 to A-21).

The Court of Appeals then rejected Petitioners' contention that the need for the quotas had not been established, by citing instances where rapid racial change had taken place (A-21), and ignoring schools like Kenwood, where an enrollment of 26% white had been maintained for years. (Pl. Exs. 2, 50). It also rejected the contention that the quotas were impermissible because they were a surrender to the racial prejudice of white students disinclined to attend schools attended by large numbers of blacks ("white

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* Nevertheless, the District Court, while awarding costs to plaintiffs, denied their request for attorneys fees under 20 U.S.C. §1617 and 42 U.S.C. §1988 (A-51), principally on the erroneous ground —not even defended by the Board on appeal—that plaintiff's counsel was not entitled to fees because it accepted the case on a *pro bono publico* basis through the Lawyers Committee for Civil Rights Under Law (Tr., Jan. 13, 1978). The District Court also expressed "doubts" if plaintiffs "prevailed" within the meaning of the attorneys' fee statute, since they continued to urge that the revised plans were unconstitutional (Tr. Jan. 13, 1978).

flight"). The Court of Appeals recognized that the quotas were in fact necessitated by white flight (A-22 to A-23), and that white flight could not be used as an excuse to avoid eradicating past discrimination (A-21 to A-22). It held, however, that preventing white flight was a permissible basis for a "voluntary affirmative action" program, even if it disadvantaged black children. (A-23).

In the final portion of its opinion, the Court of Appeals conceded that the quotas could not be upheld if there was an alternative less burdensome on blacks. (A-26). Petitioners, in fact, had suggested a number of such alternatives, including a broader desegregation plan, efforts to integrate the predominantly white schools near Morgan Park and Gage Park, and a plan involving the pairing of Gage Park and Curie, an *under-utilized* school less than 2 miles away which was 76% white. (R. 71, Letter of July 22, 1977). The *sole reason* the Board rejected the pairing proposal was that Curie was located in Marquette Park (an area that had witnessed racial disturbances by whites protesting against an influx of minorities), so that a pairing program allegedly "would be educationally disruptive." (Transcript, August 5, 1977, at 7-10). The Court of Appeals did not give strict scrutiny to the Board's rejection of these and other conceivable less discriminatory alternatives, but instead explicitly deferred to the Board's judgment (A-27):

> "The appellants have advanced alternative proposals which they claim would preserve integrated student bodies at Gage Park and Morgan Park High Schools in a less discriminatory fashion. We are not persuaded, however, that these alternatives offer a viable means of preventing *de facto* segregation at these two high schools. Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the pur-

> pose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of local school authorities."

In short, the effect of the Court of Appeals decision is to defer to a school board's imposition of unique hardships on blacks, even when greater than necessary to achieve its goals, whenever the school board professes an integrative purpose.

REASONS FOR GRANTING THE WRIT

1. The Issues in this Case Are of Extreme Importance

The quotas in this case were purportedly adopted to arrest a pattern of neighborhood racial change prevalent in many cities, especially those in the north. The pattern is simple—blacks move into a neighborhood and attend the public schools, and white enrollments drop as the "white flight" phenomenon takes place. (A-21 to A-23). As neighborhood after neighborhood undergoes such change, overall enrollments in a city's public schools become increasingly minority.

The "solution" adopted by the Chicago Board was to place a ceiling on black enrollments in an effort to stem white flight. The surface simplicity of this approach will make it an attractive prospect for all cities with changing neighborhoods. The Court of Appeals decision will therefore have broad ramifications throughout the nation.

The problem, however, is that the Court of Appeals decision explicitly defers to the "discretion of local school authorities" (A-27) in placing the burdens of integration exclusively on blacks, so long as the school board invokes an integrative purpose. This deference is apparent at two crucial stages of the Court of Appeals' analysis. First, after an elaborate insistence that racial quotas purportedly designed to preserve integration must still be justified by a compelling state interest (A-19 n.), the Court of Appeals holds that preservation of integration is *ipso facto* sufficiently compelling. (A-20 to A-21). This reasoning is not only circular, but it effectively precludes a searching judicial inquiry into either the *bona fides* of a racial classification or its detrimental effects. The second example of

deference is even more explicit, and involves the Court of Appeals' failure to scrutinize the Board's refusal to adopt less discriminatory alternatives. (A-27).

The dire effects of such deference by a reviewing Court are apparent in this case. For example, it is at least equally plausible—particularly given the Board's adherence to overall segregation patterns in Chicago—that the prevention of racial change in Morgan Park and Gage Park was designed to preserve those communities as buffer zones between the black inner city and the predominantly white enclaves farther to the west. Indeed, this conclusion is buttressed by the Board's refusal to pair Gage Park and Curie for the sole reason that the white residents of Marquette Park would resent "a large influx of minority students." (Transcript, Aug. 5, 1977 at 7-10). Moreover, the effects of the program scarcely support a conclusion that a benign purpose is being achieved. While quota levels are being attained through the exclusion of increasing numbers of blacks annually, the flight of whites has not been stemmed. Black children alone are stigmatized as unwanted in their neighborhood school, when no other child in Chicago is so treated.* And the vast majority of excluded blacks do not obtain an integrated education, even after the Board's post-trial adoption of an optional busing program. Thus, on balance, it is scarcely apparent that the quota plans are more helpful than harmful. The problem with the Court of Appeals decision, however, is that it does not even purport to strike that balance, but merely defers to the *ipse dixit* of the Board.

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* As this Court noted in *Brown* v. *Board of Education*, 347 U.S. 483, 494 (1954) with respect to children in grade and high schools:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

As the facts of this case demonstrate, an uncritical acceptance of a stated purpose to prevent segregation as a compelling state interest (A-20 to A-21), and an explicit deference to the discretion of local school authorities (A-27), will not fully protect the constitutional rights of blacks. As four Justices of this Court have noted, "any statute must be stricken that stigmatizes any group or singles out those least well represented in a political process to bear the brunt of a benign program." *University of California Regents* v. *Bakke,* 438 U.S. 265, 361 (1978) (Brennan, White, Marshall & Blackmun, JJ.). Thus, in the absence of a rule of law requiring strict scrutiny and a compelling state interest for *all* aspects of an explicit racial classification—the reason for the program, the basis if any for restricting the scope of the problem to be solved,* the effects of the program, and the specific reasons for not selecting less discriminatory alternatives—there can be no assurance that a political majority is not discriminating against a minority under the banner of a benign motive. And this is particularly true where, as here, the purported benign motive of preventing segregation has its origins in the racial prejudice underlying the white flight phenomenon. See *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, 487, 490-91 (1972) (fears of white flight do not justify racial discrimination even though the school system would be 57% white and thus "integrated").

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* For example, it is well-established that where there are general evils to be corrected, the choice of piecemeal solutions may not be made on racial grounds. *McLaughlin* v. *Florida,* 379 U.S. 184, 193-94 (1964). Thus, under a properly-applied strict scrutiny test, the Board should have explained why its efforts to foster integration extended only to limiting black attendance at integrated schools, and did not include mandatory measures to integrate schools which were predominantly white. The Court of Appeals required no such explanation.

Significantly, the Court of Appeals' deference to local school authorities is most explicit at the very point that strict scrutiny is most critical—in the choice of less discriminatory alternatives. By such deference, the Court of Appeals is eliminating the core of the equal protection guarantee—the assurance that blacks will not suffer deprivations which the state will not inflict on whites. The acid test is not whether a state's motive for a racial classification is laudable, but whether the state is willing to achieve its allegedly benign purposes by imposing the same burdens on whites as it imposes on blacks. All the evidence in this case suggests that the Chicago Board will not adopt any mandatory measures involving white children in the name of integration. By contrast, the Board adopted the quotas disadvantaging blacks over the protests of the black community, and without any concern—until forced to modify its plan by this litigation—for excluded black children's opportunity to attend integrated schools. This disparate treatment of whites and blacks is the antithesis of equal protection, but it is entirely overlooked in the Court of Appeals' broad deference to local authorities.

In short, the Court of Appeals' approach to this case sanctions explicit racial quotas disadvantaging blacks whenever the government invokes the talisman of integrative purpose. Such an approach falls far short of the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), which is necessary to vindicate the purpose of the equal protection clause to protect politically disadvantaged groups. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152 n.4 (1938). It would be a bitter irony if the goal of integration, which this Court extended to minorities in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), as a promise of equality, became a justification for further discrimination.

2. The Decision Below Conflicts in Principle with the Decisions of this Court and Other Circuits

The Court of Appeals decision, moreover, conflicts with the holding and individual opinions of this Court in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978). The conflict in result is clear. If an explicit quota cannot be used to discriminate against whites for the benefit of blacks, it surely cannot be used to discriminate against blacks, the traditional victims of discrimination, particularly where the principal beneficiaries of the quota are the whites who otherwise would be disinclined to attend the public schools.*

The opinions of the individual Justices in *Bakke* equally refute the Court of Appeals' decision. The *very purpose* of the Chicago quotas "is to assure within [a] student body some specified percentage of a particular group mere-

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* The Court of Appeals purported to distinguish *Bakke* by drawing a distinction between a total deprivation of a medical education as opposed to an assignment to a different school. (A-25). This distinction ignores the palpable deprivations suffered by quota victims. There is no question, for example, that every black child in the affected Chicago neighborhoods faces uncertainty as to the school he will attend, while every white child is assured of his admittance. (A-37 to A-39, ¶¶15-20). It is equally clear that even under the court-sanctioned busing plan, black children must travel 1½ hours *each way* to obtain an integrated education (R. 71, Beverly Review, September 14, 1977) and that faced with these burdens, the vast majority of excluded children choose to attend a closer, nonintegrated school. (A-42 to A-44, ¶¶30-32). Thus, the distinction adopted by the Court of Appeals would approve the quota in *Bakke* if Mr. Bakke found a place in another, perhaps inferior, medical school, and would approve affirmative action job quotas if the worker were demoted rather than fired. The Court of Appeals' "total denial" test is thus not only a semantic quicksand—petitioners, after all, were "totally denied" a right to attend their neighborhood school—but also creates a shifting standard that can only breed confusion and uncertainty in the development and application of racial quotas generally.

ly because of its race," and is thus "discrimination for its own sake" and "facially invalid." 438 U.S. at 307 (Powell, J.). And the quotas, unlike others approved by this Court, were not adopted in response to any "judicial, legislative, or administrative finding of constitutional or statutory violations." *Id.* The quotas here, moreover, suffer from all the infirmities which the *Bakke* quotas were said not to have—the quotas here harm a class with the "traditional indicia of suspectness," *id.* at 357 (Brennan, White, Marshall and Blackmun, JJ.); they are not designed either to "remove the disparate racial impact" of past government actions or to cure "the product of past discrimination," *id.* at 369; they "operate to stigmatize or single out [a] discrete and insular" minority group, *id.* at 374; they relegate excluded children to other schools which, in a neighborhood school system, creates "a significant likelihood that they will be treated as second-class citizens because of their color," *id.* at 375; and they "establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." *Id.* And finally, §601 of the 1964 Civil Rights Act, 42 U.S.C. §2000d, is not only itself applicable to the quotas here, but similar reasoning applies to invalidate the quotas under 42 U.S.C. §§1981, 1983 and 20 U.S.C. §1703(c). See 438 U.S. at 412-18 (Stevens, J.). Thus, the Court of Appeals decision conflicts with *Bakke* and the reasoning of the Justices reflected therein.

It also conflicts with a long line of cases in other circuits which hold it impermissible to impose a disproportionate burden of integration on blacks. *E.g., Arvizu* v. *Waco Independent School District,* 495 F.2d 499, 504-07 (5th Cir. 1974) (and cases there cited) ("[I]t is incumbent upon district courts to insure that the burdens of desegregation are distributed equitably"); *Clark* v. *Board of Education,* 449 F.2d 493, 499 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) ("the burden on all students, black and white, should be as equitable as possible"); *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753-54

(5th Cir. 1971); *Moss* v. *Stamford Board of Education,* 350 F.Supp. 879 (D. Conn. 1972); *Brice* v. *Landis,* 314 F.Supp. 974, 976-78 (N.D. Cal. 1969). *See also Haney* v. *County Board of Education,* 429 F.2d 364, 371-72 (8th Cir. 1970). And fear of "white flight" is not a sufficient explanation for imposition of an excessive burden on blacks. *E.g., Lee, supra,* 448 F.2d at 754.

In concluding that it was appropriate to place the *entire* burden of integration on blacks, the Court of Appeals' opinion conflicts with these cases holding even a disproportionate burden on blacks to be impermissible. It also conflicts, specifically, with the holding in *NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1052 (6th Cir.) *cert. denied,* 434 U.S. 997 (1977), *aff'g,* 429 F. Supp. 583, 620-21 (W.D. Mich. 1976) that a "one-way bussing" program which transported blacks but allowed whites to remain in their neighborhood school, "without a corresponding effort to spread the burdens of integration more equitably through the system, is an act of *de jure* segregation." And the quotas here, unlike the plans addressed in several cases cited by the Court of Appeals (A-22 to A-23), do not even have the virtue of being part of an effort to eradicate segregation on a system-wide basis.*

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* The same point disposes of the Court of Appeals' reliance on this Court's dictum in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), that a school board may adopt a voluntary plan to promote integration. In *Swann,* however, this Court carefully noted that such a program would be permissible where "each school'" in the district would reflect the district-wide racial make-up. Here, the quotas are not part of an effort to desegregate an entire system, and the racial balance they are seeking to preserve at two schools is virtually twice the 25% white enrollment of the system as a whole. (Pl. Ex. 2). To preserve some schools as 50% white in such a setting necessarily means that the remaining schools will have disproportionately black enrollments. And the failure to eradicate segregation on a system-wide basis raises the danger, amply present here, that a school board's selective efforts are an attempt to disadvantage blacks under the guise of benign objectives.

Thus, while purporting to adhere to the strict scrutiny standards applicable to explicit racial classifications, the Court of Appeals in fact accepted the mere recitation of a benign purpose as an automatic shield for a quota disadvantaging blacks. It appeared to place the burden of proving the absence of less discriminatory alternatives on plaintiffs rather than on the Board by explicitly deferring to the "discretion of local school officials." (A-27). In peremptory fashion, it dismissed the viability of other alternatives, including the suggestion for a pairing of Gage Park and Curie which the Board had rejected for the sole reason that it would discomfit the white residents of Marquette Park. (Transcript, August 5, 1977, at 7-10). In short, the Court of Appeals decision is inconsistent with the standards articulated by this Court and other Circuits to test racial classifications, particularly those adversely affecting blacks.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March, 1980

Appendices

APPENDICES

APPENDIX A

Opinion of the Court of Appeals

In the

United States Court of Appeals

For the Seventh Circuit

No. 78-1215

KATHY SUE JOHNSON, etc., *et al.*, and DARCEL MILTON, etc., *et al.*,

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 76-C-995, 76-C-996—HUBERT L. WILL, *Judge.*

Argued October 30, 1978—Decided August 13, 1979

Before CASTLE, *Senior Circuit Judge,* BAUER and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* The principal issue presented by this appeal is whether the Constitution permits local school authorities to impose racial quotas on enrollments

in connection with a desegregation plan voluntarily enacted to prevent *de facto* segregation in the public schools. Plaintiffs-appellants appeal from the order of the district court upholding the challenged desegregation plan as constitutional and enjoining the defendants-appellees to maintain and to continue the plan, as modified to provide for the voluntary busing of students excluded from admission to their neighborhood high schools to alternative integrated high schools. Appellants further appeal from the order of the district court denying their petition for attorneys fees. We affirm the judgments appealed from for the reasons set forth below.

I

These consolidated civil rights actions for declaratory judgment and injunctive relief were filed on March 15, 1976, challenging as unconstitutional a desegregation plan adopted voluntarily by the Board of Education of the City of Chicago in an effort to arrest the trend toward segregated enrollments at two Chicago public secondary schools. The challenged desegregation plan, commonly referred to as the "Student Racial Stabilization Quota Plan" ("Plan"), established a ceiling on enrollments and imposed racial quotas with respect to admissions at Morgan Park and Gage Park High Schools. Plaintiffs-appellants in *Johnson* v. *Board of Education* are black children and their parents residing in the Morgan Park High School attendance area.[1]

[1] The term "attendance area", as used herein, refers to the geographic zone or sub-district of the Chicago public school district established by the Board of Education for Gage Park and Morgan Park High Schools. All elementary students residing within the Gage Park sub-district are eligible to attend Gage Park High School. Similarly, all elementary students residing in the Morgan Park sub-district are eligible to attend Morgan Park High School.

Plaintiffs-appellants in *Milton* v. *Board of Education* are black children and their parents residing in the Gage Park High School attendance area. Plaintiffs' complaints alleged that the Plans, as instituted at Morgan Park and Gage Park High Schools, deprived them of their rights under the Constitution and under Title 42 U.S.C. §§ 1981 and 1983, and under Title 20 U.S.C. § 1703(c) because the Plans restricted the admission of minority students to these high schools solely on the basis of race.

Defendants-appellees named in these actions are the Board of Education of the City of Chicago, the individual members of the Board of Education, and Dr. Joseph P. Hannon, General Superintendent of Schools. Defendants filed answers to the complaints, denying the Plans were unconstitutional and denying plaintiffs were deprived of any rights under federal law. Defendants further alleged that plaintiffs had no constitutional right to attend Morgan Park or Gage Park High School since the Board of Education, vested by state statute with the supervision and management of the public school system of the City of Chicago, is empowered to divide the city into attendance areas and to apportion the pupils to the several schools, taking into consideration the prevention of racial segregation in the public schools. In the performance of these statutory duties, the Board contended the Plans were necessary to alleviate overcrowding and to promote integration at Morgan Park and Gage Park High Schools, both of which had experienced an accelerated change in the size and racial composition of their enrollments as a result of a concomitant demographic change in the residential neighborhoods encompassing the attendance areas of these schools.

On April 29, 1976, three days after the filing of defendants' answer, plaintiffs in *Johnson* presented a motion for a temporary restraining order seeking to enjoin the

implementation of the Plan at Morgan Park High School, which was scheduled to begin the next day with a lottery drawing to select the incoming freshman class for the fall of 1976. The district court denied the motion. On August 17, 1976, after extensive discovery by means of interrogatories and document production, plaintiffs filed a motion for a preliminary injunction or in the alternative for summary judgment. On September 27, 1976, the district court denied the alternative motion for summary judgment, but deferred ruling on plaintiffs' motion for preliminary injunction, stating its preference for a modification of the Plans to include a voluntary busing program for students excluded from these two schools to attend alternative integrated high schools.

At the conclusion of discovery, entry of a final pre-trial order, stipulation of additional facts and admission of exhibits into evidence, and after both parties agreed to withdraw objections, the parties rested on June 27, 1977. At that time, counsel for the Board advised the court of a pending modification of the Plans to be acted upon at the next Board meeting. The district court then stated it was prepared to find the Plans as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

On July 13, 1977, the Board adopted a modification of the Plans, which provided bus transportation to white or integrated schools from a convenient point near the residences of all students in the Gage Park and Morgan Park attendance areas who were not selected for admission to these two schools under the Plans. By an order of the district court entered August 12, 1977, the Board was directed to implement procedures for publicity and student counseling with respect to the Plans, as modified, and further, to provide that designated spaces at the alternative schools

which were not filled by students excluded from one school (e.g., Gage Park) would be made available to students excluded from the other school (e.g., Morgan Park).

On December 30, 1977, the district court entered its findings of fact and conclusions of law, and granted judgment in favor of the defendants. The court held that the Plans, as modified to include bus transportation to primarily white or integrated schools for those students not admitted to Gage Park or Morgan Park High Schools, restored to plaintiffs their constitutional rights in that plaintiffs had a meaningful opportunity to attend a Chicago public high school in an integrated setting. The court further ordered that defendants be enjoined to continue the Plans, as modified. On January 23, 1978, the district court granted plaintiffs' petition for costs, but denied their request for attorneys fees.

Plaintiffs subsequently appealed from these adverse judgments to this Court. First, appellants contend the Plans, as modified, violate their rights secured by the equal protection clause of the Fourteenth Amendment. Second, appellants contend that the district court erred in denying their request for attorneys fees.

II

Before addressing the merits of the appellants' contentions, however, it is necessary to explicate in appropriate detail the development and implementation of the challenged desegregation plan, as supported by the record before this Court.

Gage Park and Morgan Park High Schools Prior to the Adoption of the Plans

Gage Park High School, 5630 South Rockwell Avenue (2600 West), Chicago, and Morgan Park High School, 1744 West Pryor Avenue (11200 South), are public high

schools owned and operated by the Board of Education of the City of Chicago. But for the Board's Plans, freezing enrollment and establishing racial quotas with respect to admissions at these two high schools, all eighth grade students residing in the Gage Park or Morgan Park attendance areas would have been offered the opportunity to attend Gage Park or Morgan Park High School. In 1975, Gage Park High School was approximately 41% white and 59% nonwhite, while Morgan Park was 37% white and 63% nonwhite. The comparable figures for 1976 are 42% white and 58% nonwhite for Gage Park, and 38% white and 62% nonwhite for Morgan Park. As the district court found, students enrolled at Gage Park and Morgan Park are thus attending school in an integrated setting.

The district court also found that the residential neighborhoods encompassing attendance areas for these two schools were in part undergoing an accelerated racial change from white to black in the period immediately preceding the implementation of the Plans, which began in September 1975 at Gage Park High School and in September 1976 at Morgan Park High School. Both schools were also operating in excess of their permanent facility capacities because of increasing enrollments.

During the period from 1972 to 1974, black enrollment at Gage Park had increased from 1,056 to 1,361. The racial composition of all students attending public and nonpublic elementary schools in the Gage Park attendance area in 1975 was 5,235 black, 8,617 white, 1,174 Hispanic and 110 "other". As of January 30, 1976, enrollment at Gage Park High School was 2,441 and the school was operating at 106% of capacity.

During the period from 1972 to 1975, black student enrollment at Morgan Park had increased from 52.3% to 62.3% and white student enrollment had declined from

45.7% to 36.9%. In this same period, total enrollment increased from 3,092 to 3,423. The racial composition of all students attending public and nonpublic elementary schools and residing in the Morgan Park attendance area in 1976 was 6,842 black, 7,312 white, and 144 "other". As of January 30, 1976, enrollment at Morgan Park High School was 3,323 and the school was operating at 128.6% of capacity of permanent facilities.

Statistics presented by the Board of Education indicated that in rapidly changing neighborhoods where no action had been undertaken by the Board segregated schools had resulted. For example, during the period from 1970-1975, white enrollment at the following Chicago public high schools declined dramatically: Fenger High School, 46.6% to 1.0%; Orr High School, 30.6% to 5.0%; Bowen High School, 36.2% to 6.6%. The Board therefore regarded the Student Racial Stabilization Plans as necessary to prevent the incidences of racial isolation which had occurred at schools situated in neighborhoods experiencing a rapid change in racial composition.

The Board's stated purpose for the adoption of the racial quotas was to prevent overcrowding and to prevent Gage Park and Morgan Park High Schools from becoming racially segregated. Consequently, the quota for the admission of black students at each school was necessarily set at a lower level than that at which black students would have applied and have been admitted but for the quota.

The Gage Park Plan

On May 14, 1975, the Board of Education of the City of Chicago adopted a Student Racial Stabilization Quota Plan establishing a ceiling on enrollment and a racial quota with respect to admissions at Gage Park High School. Under this Plan, enrollment, which had reached 2,441 and was

projected at 3,100 for September 1975, would be held to a maximum of 2,800 students with a racial composition of 48% black, 42% white, 8% Hispanic and 2% principal's option. The selection of incoming freshmen would be determined by lottery.

The first lottery, in preparation for the September 1975 academic year at Gage Park High School, was held on June 2, 1975. Under the Plan, separate lottery lists were prepared for white, black and Hispanic students and students were selected for admission in the order their names appeared on the list until the quota for their race had been filled. Thus, the group of students accepted into Gage Park for the September 1975 school year included all those names down to a red line on the lottery list for each race. The red line appeared immediately below the last name on the lottery list for white students—No. 289. By contrast, the red line appeared below name 200 on the black list, which had a total of 498 names, indicating the exclusion as of that date of 298 applicants.

Students initially denied admission were offered the opportunity to attend Gage Park High School in the event another student of the same race, previously admitted to the school, elected not to attend. Moreover, since the racial percentages were to be applicable to the school as a whole rather than to the incoming class, additional black students were to be admitted to the extent that additional white students elected to attend Gage Park so that the prescribed racial balance was maintained. Thus, within two weeks after the lottery drawing an additional 60 black elementary students who had been placed on a "waiting list" were given the option to enroll in Gage Park High School. By October 1, 1975, all of the originally excluded 498 black students had been offered the option of enrolling in Gage Park. An additional 212 black students who applied for

admission after the June 2, 1975 lottery were not offered the option of enrolling into Gage Park High School. Each of the 136 additional white students applying for admission after the June 2, 1975 lottery were offered the opportunity to enroll at Gage Park High School.

The Gage Park Plan was also applied to the freshman class entering in September 1976, with the applicable lottery drawing held on January 19, 1976. The entering class in 1976, as determined by the drawing, was 44% white (229/519), 43% black (224/519) and 12% Hispanic (61/519). A student racial/ethnic survey dated October 29, 1976, and conducted by the Board of Education, showed that the entering freshman class of September 1976 at Gage Park was in fact 42.6% white (228/535), 45.4% black (243/535), and 11.4% Hispanic (61/535).[2]

With respect to the January 1976 drawing for the school year commencing in September 1976, a red line appeared immediately below the last name on the list for white students, No. 309. By contrast, the red line appeared below name No. 300 on the black list, which contained a total of 626 names, indicating the exclusion at the time of the drawing of 326 black applicants. Thus, all 309 white students included in the January lottery and all 181 white students applying thereafter were offered the opportunity to enroll in Gage Park for September 1976. Of the 626 black students included in the lottery and the 210 additional students applying thereafter, 300 black students were permitted to enroll and 243 actually attended Gage Park High School. At least 411 black students were excluded from Gage Park High School as of October 12, 1976 as a result of the racial quota.

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[2] In 1975 and 1976, all of the freshmen attended the Gage Park High School "branch", which is on the same campus as the high school, is part of the permanent facility, and is utilized by freshmen only.

On January 21, 1977, a lottery drawing was held for the September 1977 freshman class at Gage Park High School. Of the 754 black children in the lottery drawing, 425 were accepted as enrollees and 329 were denied admission. Of the 85 Hispanic students, 35 were accepted and 50 were denied admission. Not one of the 364 white students who applied was denied admission to Gage Park High School.

The Morgan Park Plan

On March 10, 1976, the Board of Education adopted a Student Racial Stabilization Quota Plan which established a ceiling on enrollment and imposed a racial quota with respect to admissions at Morgan Park High School. Overcrowding at Morgan Park, which was operating at 128.6% of its permanent facilities capacity, was to be reduced by limiting the enrollment of incoming 9th graders to 700 students divided approximately 50% white and 50% black. Unlike Gage Park, there is no significant number of Hispanic students attending Morgan Park High School. The Morgan Park Plan differed in two other respects from that implemented at Gage Park. First, the racial quotas were applied to each entering class, rather than to the school as a whole. Second, the Morgan Park Plan provided for the admission of a maximum of 350 black students, even if less than 350 white students applied. By contrast, the Gage Park Plan admitted black students to the extent that sufficient numbers of white students were in attendance so that the requisite 48% to 42% black-to-white student ratio was maintained.

The lottery to determine the September 1976 admissions to Morgan Park High School was held on April 30, 1976. As of May 10, 1976, ten days after the drawing, all 484 white students in the lottery were offered the option to

enroll in Morgan Park. An additional white student, who apparently was never assigned a lottery number, was notified of her admission on May 11, 1976. Subsequently, 33 white students applying as transfer students were also admitted. Of the 480 black students seeking admission, 350 were offered the option to enroll in Morgan Park, indicating that 131 black students were denied admission as of that date. On or after September 27, 1976, 33 of the black students placed on the "waiting list" were offered the opportunity to enroll at Morgan Park. A number of such students, who were attending other schools at that time, declined to transfer to Morgan Park. Thus, as of October 29, 1976, 538 black and 490 nonblack students were eligible to apply for admission to the 1976 freshman class. No white student was denied admission to Morgan Park, but 126 black students were denied admission, which number included 15 transfer students. The number of students actually admitted to Morgan Park High School as freshmen in September 1976 was 350 black and 272 nonblack.

On February 3, 1977, the applicable lottery drawing was held for the September 1977 freshman class at Morgan Park High School. The eligible students included 610 whites and 612 blacks. In April 1977, each white student who wished to attend Morgan Park High School was notified of his or her admission; the total admitted was 317. At the same time, 350 black students were notified of their admission, and 157 black children who wished to attend the school were excluded.

Results of the Original Plans

At the time the Student Racial Stabilization Quota Plans were adopted there were substantially more white students than black students in public and nonpublic elementary schools in the Morgan Park and Gage Park attendance

areas. However, it became apparent after the Plans were in operation that the number of white students seeking admission at each high school was less than the quota set for white students and that the number of black and Hispanic students applying exceeded the quotas for those groups. Thus, no white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students were denied admission to these schools annually from the inception of the Plans.

Under the Plans as originally adopted by the Board, students denied admission to Gage Park and Morgan Park High Schools were permitted to attend any "under-utilized" Chicago public high school through the Board's Permissive Transfer Program.[3] Under this Program, every child attending an over-utilized high school in the City of Chicago (which included Gage Park and Morgan Park High Schools) was given the option of attending an under-utilized school. Thus, prior to and irrespective of the Student Racial Stabilization Quota Plans, Gage Park and Morgan Park High School students could have elected to attend these under-utilized schools.

Until the Board adopted a revised voluntary transfer program, excluded students residing in the Morgan Park and Gage Park attendance areas were required to travel to alternative schools using public transportation. Carfare was provided to students excluded from Gage Park High School commencing in September or October 1976, the

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[3] "Under-utilized" was defined to mean a school with a total student enrollment below the "city-wide per cent of capacity" of 101.3%. In 1975, 22 of 51 general high schools were above the level of 101.3% utilization (excluding so-called "temporary facilities"). In 1976, 29 of 51 high schools were above that level.

second year the Plan was in operation. For students excluded from Morgan Park High School carfare was provided from the inception of the Plan in September 1976.

Of the eighteen general high schools available to those denied admission as a result of the racial quotas, six have significant white enrollments and are located on the north side of the City of Chicago. None of these six predominantly white-attended schools are situated south of 4000 North and three are north of 5800 North in Chicago. By contrast, Gage Park High School is located at 5600 South and Morgan Park is located at 11200 South in Chicago. Thus, the closest of these primarily white alternative schools, Lakeview, is 11.4 miles from Gage Park and 18.15 miles from Morgan Park High School.

Accordingly, under the original Plans, travel to these eighteen schools from Gage Park or Morgan Park High Schools involved (1) taking a bus to the Dan Ryan rapid transit line; (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines; (3) travel on the Howard or Ravenswood rapid transit lines; and in two instances (4) an additional bus trip to the school.

Of the 416 black students excluded from Gage Park High School as a result of the 1975 lottery, 306 of these students enrolled in 28 other predominantly black high schools, 11 attended 6 other schools with significant white enrollments, and data with respect to the 99 additional black students was unavailable. Of the 539 black students denied admission to Gage Park in the 1976 lottery, 471 students attended 24 alternative high schools with predominantly black enrollments, and 68 students enrolled in 6 alternative high schools with significant white enrollments.

Of the 193 black students excluded from admission to Morgan Park High School in the 1976 lottery, 191 at-

tended alternative schools whose enrollments were over 99% minority, and two students attended one school which had a significant white student enrollment.

Modification of the Plans

On July 13, 1977, the Board of Education adopted Board Report No. 77-212-6 (Revised), which modified the Gage Park and Morgan Park Student Racial Stabilization Quota Plans by providing excluded minority students the option of attending certain North side predominantly white or integrated schools by means of bus transportation provided by the Board of Education. Under the terms of the modification enacted by the Board, ten alternative white or integrated schools were made available to excluded Gage Park and Morgan Park black children, with up to 1,262 spaces designated for Gage Park transfer students and up to 390 spaces designated for Morgan Park transfer students to these schools. In addition, the modification included a publicity program concerning the Plans and a counseling service for students who participated in the Plans. These modifications were implemented immediately by the Board in order to be incorporated into the operation of the Plans for the school term beginning in September 1977.

Results of the Modified Plans

As of October 12, 1977, 102 of the 1,632 students excluded as a result of the Gage Park and Morgan Park Plans had availed themselves of the opportunity to attend one of these ten alternative high schools, utilizing 7 buses at a cost of $1,014 per day. As of October 1978, the Board reported that 359 excluded students were participating in the Plan for the 1978 school year, and attending nine of the alternative schools offered under the modified Plan.

The district court found that the Plans were attempts on the part of the Board to relieve overcrowding and to promote integration at schools situated in rapidly changing neighborhoods, and that experience had shown that the Board achieved both objectives at each high school. Thus, as a result of the modified Plans, the racial balance at Gage Park High School is 45.4% black, 41.9% white, and 12.7% "other", and the racial balance at Morgan Park is 59% black and 41% white. The enrollment at Gage Park has been reduced to 2,102 students and the school is operating at 91.3% of capacity. The Morgan Park enrollment has been reduced to 2,613 students and the school is operating at 101.2% of capacity.

III

Appellants' principal contention on appeal is that the Student Racial Stabilization Quota Plans instituted by the Board of Education at Gage Park and Morgan Park High Schools are statutorily and constitutionally infirm. We are not persuaded by the arguments advanced in support of these contentions, and accordingly conclude that the Plans, as modified, are statutorily and constitutionally permissible.

A

We begin by addressing the appellants' argument that the Illinois School Code explicitly proscribes the racial quotas challenged in this litigation.[4] It is true, as the

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[4] The Illinois statute governing the powers of the Board of Education of the City of Chicago provides, in pertinent part, as follows:

"The board shall exercise general supervision and management of the public education and the public school system of the city, and shall have power:

* * * * *

"7. To divide the city into sub-districts and apportion the pupils to the several schools, but no pupil shall be excluded

(footnote continued)

appellants argue, that the statute appears on its face to prohibit the Board from considering race as a basis for excluding a student from admission to a public school situated within a particular attendance area. However, it is also true that the statute empowers the Board to consider race as a basis for revising the geographic boundaries of a particular attendance area where necessary to prevent racially segregated enrollments. Indeed, we think a fair reading of the statute discloses that the central purpose of this provision was to invest the Board with sufficient discretionary authority to achieve "the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality." Viewing the statute in light of this purpose, we perceive no rational basis for a statutory construction which permits the Board to prevent segregation through a racially-based redistricting plan but prohibits the Board from achieving the same end through a racially-based intradistrict transfer plan. We therefore decline to ascribe to the statute a prohibition inconsistent with its underlying purpose, and accordingly hold that the statute does not foreclose the Board from restricting the racial composition of the enrollment at a school within a particular attendance area where, as here, such a remedial measure achieves the prevention of *de facto* segregation in the public schools. *See North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 45-46 (1971).

(footnote continued)

> from or segregated in any such school on account of his color, race, sex, or nationality. The board shall, as soon as practicable, and from time to time thereafter, change or revise existing sub-districts or create new sub-districts in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race, sex or nationality. . . ."

Ill. Rev. Stat. 1975, ch. 122, § 34-18, para. 7.

Nor are we persuaded that the Board of Education exceeded its statutory authority in establishing racial quotas with respect to admissions at Gage Park and Morgan Park High Schools. In reviewing various integration solutions promulgated by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U.S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 49 (1973); *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 469 (1972).

Moreover, it is well-settled in both federal and state law that local school boards may voluntarily adopt plans including busing to promote integration. As the Supreme Court declared in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971):

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluarlistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this is within the broad discretionary powers of school authorities. . . ."

402 U.S. at 16. The Illinois Supreme Court has also recognized the authority of local school boards to undertake voluntary programs designed to remedy *de facto* segregation, as stated in *Tometz* v. *Board of Education, Waukegan City School District No. 61,* 39 Ill.2d 593, 237 N.E.2d 498 (1968):

> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue . . . . Similarly,

> the Federal courts which have considered the issue . . . have recognized that *voluntary* programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden . . . ."

39 Ill.2d 597, 237 N.E.2d at 501 (citations omitted) (emphasis added).

In the case at bar, the Chicago Board of Education voluntarily adopted a desegration plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school.

Accordingly, in view of the broad statutory powers vested in the Board to formulate and to implement educational policy, including the establishment of programs designed to preserve integration in the public schools, we regard the Board's efforts to prevent *de facto* segregation as a legitimate exercise of its discretionary authority consistent with its legislative mandate and established principles of local school autonomy.

B

Of course, no state law may operate in contravention of the Constitution. School board policies and the present laws with respect to local autonomy are not sacrosanct, and if they conflict with the Fourteenth Amendment fed-

eral courts are charged with an affirmative duty to prescribe appropriate remedies. *Milliken* v. *Bradley,* 418 U.S. 717, 744 (1973). The principal task before this Court, therefore, is to determine whether the imposition of a racial quota against the admission of minority students to particular schools, however "benign" in its objectives, violates the equal protection clause of the Fourteenth Amendment.[5]

It is well-settled that state actions which restrict fundamental rights or which distinguish between individuals solely on the basis of race are regarded as inherently suspect and subject to strict judicial scrutiny. *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 16-17 (1973). The state action challenged here, however, does not involve a fundamental right. Federal and state courts have uniformly rejected the

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[5] The threshold question raised by the parties is the proper standard of judicial review. Appellants contend the racial quotas are explicit classifications based solely upon race. As such, appellants argue the Plans merit strict judicial scrutiny and accordingly cannot be justified in the absence of a compelling state interest. Appellees contend the appropriate standard of review is whether the assertedly benign discrimination attendant with the racial quotas bears a rational relationship to the legitimate governmental purpose of preventing *de facto* segregation in the public schools. We reject appellees' contention, as well as their further argument that, by characterizing the Plans as *voluntary* affirmative action, the applicable standard of review is less exacting than strict scrutiny. We regard any state action involving racial discrimination, however "benign", as requiring analysis under the strict scrutiny-compelling state interest standard. *See, e.g., University of California Regents v. Bakke,* 438 U.S. 265, 291 (Opinion of Powell, J.), 357 (Opinion of Brennan, White, Marshall, Blackmun, JJ.) (1978).

contention of a constitutional right to attend a particular school. *See, e.g., McDaniel* v. *Barresi,* 402 U.S. 39 (1971); *Norwalk C.O.R.E.* v. *Norwalk Board of Education,* 423 F.2d 121 (2d Cir. 1970); *Allen* v. *Asheville City Board of Education,* 434 F.2d 902, 905 (4th Cir. 1970); *Moss* v. *Stamford Board of Education,* 356 F.Supp. 675 (D.C. Conn. 1973); *People ex rel. Altman* v. *Board of Education of the City of Chicago,* 90 Ill. App.2d 21, 30, 234 N.E.2d 362, 366 (1967); *Citizens Against Busing* v. *Palmason,* 80 Wash.2d 445, 495 P.2d 657 (1972).

But there is no question that the challenged desegration plan rests solely upon distinctions according to race. Therefore, if the Plans are to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate, *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967), and even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Independent School District* v. *Rodriguez, supra; Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

Guided by these principles, we proceed to an examination of the merits of the arguments advanced by the appellants in support of their contention that the Plans are violative of the Fourteenth Amendment. First, appellants contend the Board failed to establish the requisite compelling state interest to justify the imposition of racial quotas in connection with the Plans. The record in these cases plainly refutes this contention. The Board's articulated purpose for the adoption of the Plans was the alleviation of overcrowding and the prevention of *de facto* segregation at Gage Park and Morgan Park High Schools. We find the state interest in promoting integration in these two high schools and communities, while at the same time

affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling.

Second, appellants argue that the Board failed to show that the racial quotas were necessary to achieve the state interest in preventing the racial segregation of Gage Park or Morgan Park High Schools. This assertion is similarly unsupported by the record. It had been the Board's experience that, where no stabilization quota plans were instituted, schools situated in rapidly changing residential neighborhoods had become racially segregated. For example, Fenger High School, which adjoins the Morgan Park attendance area on the east, went from white enrollment of 46% to 1% during the period from 1970-1975. The Gage Park and Morgan Park attendance areas had been undergoing an accelerated change in residential occupancy from white to black and, while these high schools were still integrated at the time the Plans were instituted, their enrollments were rapidly becoming predominantly black. Accordingly, the Plans were designed to stabilize the integrated character of Gage Park and Morgan Park High Schools and to prevent their enrollment from becoming segregated. The district court found the Plans successfully arrested the segregative impact of population change in the attendance areas of these two high schools.

Thus, the legitimacy of the racial quotas imposed in connection with this voluntary desegregation plan turns upon a determination of whether the Board may properly consider the unpleasant realities of demographic change and the phenomenon of "white flight" when it seeks to preserve integration in the public schools.

It is clear that the prospect of white flight and consequent resegregation cannot justify failure to comply with a court decree ordering integration. *Monroe* v. *Board of*

Commissioners of the City of Jackson, 391 U.S. 450, 459 (1968); *United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 490-491 (1972). But we regard these cases as inapposite to the factual setting in this case. Both *Monroe* and *Scotland Neck* involved resistance to a judicial order to desegregate, and the circumstances in each case revealed that the motivating concern with respect to white flight was not the preservation of integration, but the interests of white students seeking to accommodate their own prejudice—the disinclination to attend school with black students. In this case, there is no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools. On the contrary, it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans.

Moreover, where the existence of white flight is not used as a shield to avoid mandatory desegregation or to perpetuate segregation, federal courts have held that local school authorities may legitimately take into account the phenomenon of white flight in formulating voluntary programs designed to achieve integration. *See, e.g., Higgins* v. *Board of Education of the City of Grand Rapids,* 508 F.2d 779, 794 (6th Cir. 1974); *Parent Association of Andrew Jackson High School* v. *Ambach,* 598 F.2d 705, 720 (2d Cir. 1979).

Contrary to the appellants' contention, the record in these cases documents the existence of white flight from these two high schools. Although more white students than black students resided in the Morgan Park and Gage Park attendance areas, white enrollments in these schools were declining while black enrollments were increasing.

The difference between the numbers of white students eligible to enroll at these high schools and those actually admitted is attributable to the fact that white students were enrolling in parochial schools serving these attendance areas.

The Supreme Court has recognized that "substantial benefits flow to both whites and blacks from interracial association . . . ." *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 94-95 (1977), and those benefits cannot be achieved in the public schools unless a school board may consider steps to resist racial segregation. The record in these cases substantiates the emerging patterns of population change and the concomitant phenomenon of white flight in the Gage Park and Morgan Park communities. This phenomenon cannot be ignored in any meaningful effort to preserve integration at the public high schools serving these communities. The exodus of white children from the public schools would disadvantage the entire community and would imperil the success of this voluntary desegregation plan. In light of these realities, we are persuaded that considerations of race, and in particular, racial quotas, are a necessary means of arresting *de facto* segregation in the public schools. Indeed, in fashioning a school desegregation remedy, race must inevitably be taken into account. In *McDaniel* v. *Barresi,* 402 U.S. 39 (1971), involving the busing of black students to other than their neighborhood schools, the Supreme Court declared:

> "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."

402 U.S. at 41 (citations omitted). Thus, in the limited circumstances of voluntary affirmative action, and in the absence of an invidious or pernicious intent attributable

to the Board, we conclude that the Board was entitled to consider the probability of white flight in formulating a remedial plan to prevent *de facto* segregation in the public schools.

We are aware of no persuasive authority to the contrary. Appellants rely on the prior decision of this Court in *Lawlor* v. *Board of Education of the City of Chicago,* 458 F.2d 660 (7th Cir. 1972), *cert. denied,* 413 U.S. 921 (1973), as support for their contention that the racial quotas violate the strictures of the Fourteenth Amendment. In *Lawlor,* plaintiffs, who were parents of white students residing in the O'Toole Elementary School attendance area, brought a civil rights action under 42 U.S.C. § 1983 alleging that the administrative practices and policies of the Chicago Board of Education resulted in the denial of due process and equal protection of law by permitting too many black students to attend the O'Toole Elementary School, and that such conduct was causing the departure of white students and would result in the O'Toole attendance area becoming increasingly black. Plaintiffs sought a judicial declaration to that effect, and an injunction which would limit to a range of 10% to 25% the number of black students enrolled in the O'Toole area schools. In affirming the district court's dismissal of the complaint for failure to state a claim, we held that plaintiffs had no constitutional right and the Board had no constitutional duty to establish a particular racial balance.

The contention that appellants in the instant case have a constitutional *right* to demand that a school have a particular racial balance was rejected in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 24 (1971). Moreover, the absence of a constitutional *duty* on the part of the school authorities to establishing racially-based enrollments does not preclude the Board

from prescribing a racial balance to remedy the segregative impact of demographic change. We therefore find appellants' reliance on *Lawlor* to be misplaced.

Nor do we regard the decision in *University of California Regents* v. *Bakke,* 438 U.S. 265 (1978), rendered subsequent to the district court's decision in this case, as requiring reversal. Clearly, the Plans do not suffer from the constitutional infirmity which the majority of the Supreme Court found existing in the total exclusionary admissions program in *Bakke.* The opinion of Mr. Justice Powell (Brennan, White, Marshall, and Blackmun, JJ., concurring) noted that the position of Allan Bakke, who may have been deprived altogether of a medical education, was wholly dissimilar to that of students who are bused from their neighborhood schools to a comparable school for integration purposes. *Bakke, supra* at 300, n.39. Thus, unlike the admission program in *Bakke,* race is not used under the Board's Plans as the basis for distributing a limited number of spaces among a large number of applicants. Appellants, unlike Allan Bakke, are not excluded from attending school by the racial quotas imposed in this case. Rather, the stabilization quotas established for students living in the Gage Park and Morgan Park attendance area merely involved the reassignment of students, each of whom has been afforded a viable opportunity to attend an integrated high school either at Gage Park or Morgan Park, which have been racially stabilized by the Plans, or at one of the 10 alternative integrated high schools which provide a guarantee of enrollment and bus transportation to facilitate attendance.

Accordingly, in view of the findings on the record of the existence of white flight and the compelling state interest in promoting integration, we hold that voluntary state action directed toward the prevention of *de facto* segrega-

tion in the public schools is constitutionally permissible where, as here, the racial quotas imposed in connection with the desegregation plan provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school.

C

As an independent basis for finding a violation of the equal protection clause, the appellants contend the Board failed to establish that the objective of preventing *de facto* segregation in the public schools could not be achieved by less discriminatory alternatives. Appellants argue in this connection that the racial quotas operated to devolve upon minority students the entire burden of desegregation, since only minority students were excluded from attending Morgan Park and Gage Park High Schools.

It is true that no white student was ever denied admission to Gage Park or Morgan Park High Schools under the Plans. But it is also true that white students enrolled in these high schools were precluded from transferring to another school until the quota for white students had been exceeded and that when the white enrollment exceeded the established quotas they also would be denied admission. Thus, the implementation of the racial quotas resulted in the exclusion of minority students only because the Plans were designed to address the practical problem of the exodus of white students from Gage Park and Morgan Park, and not because of any inherent inequity in the Plans themselves. Indeed, the racial quotas established for each high school permitted more minority students than white students to enroll, even though the white student population exceeded the nonwhite student population residing in the attendance areas serving these schools.

As the district court found, the racial balance at Gage Park is 58.2% nonwhite and 41.9% white, and the racial balance achieved at Morgan Park is 59% nonwhite and 41% white.

The appellants have advanced alternative proposals which they claim would preserve integrated student bodies at Gage Park and Morgan Park High Schools in a less discriminatory fashion. We are not persuaded, however, that these alternatives offer a viable means of preventing *de facto* segregation at these two high schools. Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of local school authorities.

Accordingly, in view of the compelling state interest in preventing *de facto* school segregation, the realities of population change, and the discretion accorded to local school authorities in fashioning desegregation remedies, we perceive no invidious discrimination in the Board's modified stabilization quota plans, which successfully arrested the segregative impact of demographic change and preserved the integrated character of the enrollments at Gage Park and Morgan Park High Schools.

IV

Appellants also appeal from the judgment entered upon the district court order denying their petition for attorneys fees, contending they were entitled to such fees under the Emergency School Aid Act, 20 U.S.C. §§ 1601 *et seq.*, and under the Civil Rights Attorneys Fees Award Act of 1976, 42 U.S.C. § 1988. We are unpersuaded by the arguments

advanced in support of this contention, and therefore conclude that the district court properly denied the requests for attorneys fees.

An award of attorneys fees under the statutes relied upon by the appellants is predicated upon the express condition precedent that the petitioner be a prevailing party, and even then, fees may only be awarded upon the exercise of the court's discretion. Title 20 U.S.C. § 1617; Title 42 U.S.C. § 1988. It is patently clear from the record that the appellants were not the prevailing parties in these proceedings. The relief sought by their complaints was the abolition of the Board's Student Racial Stabilization Quota Plans instituted at Gage Park and Morgan Park High Schools. Since the district court upheld the Plans as constitutional, it cannot be said that the appellants prevailed on the merits of their complaints.

Moreover, even assuming *arguendo* that appellants "prevailed" in the sense that these actions resulted in the modification of the Plans to provide bus transportation to alternative schools for students denied admission to Gage Park and Morgan Park High Schools, there is no basis in the record for concluding that the district court abused its discretion in denying appellants' petition for attorneys fees.

For the foregoing reasons, the judgments appealed from are affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Court of Appeals Order Denying Rehearing

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
December 6, 1979.

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

KATHY SUE JOHNSON, et al.,

Plaintiffs-Appellants,

No. 78-1215 vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants-Appellees.

and

DARCEL MILTON, et al.,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Defendants-Appellees.

On Petition for Rehearing and Suggestion for Rehearing *En Banc.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Plaintiffs-Appellants, no judge in active service has requested a vote thereon,* and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Hon. Walter J. Cummings and the Hon. Robert A. Sprecher did not participate in any consideration of the petition for rehearing *en banc*.

Appendix C

Judgment Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

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76 C 995 and 76 C 996 (Consolidated)

JUDGMENT ORDER

These actions having come on for trial by the Court, without a jury, and the issues having been duly heard, a decision having been duly rendered, and the Court having made its findings of fact and having stated its conclusions of law,

IT IS ORDERED AND ADJUDGED:

1. That defendants Board of Education of the City of Chicago, *et al.*, their successors, and any others acting in concert with any of them, be and hereby are permanently enjoined and prohibited from adopting, maintaining, or implementing any admissions or racial quota plan for Morgan Park or Gage Park High School which excludes black or Hispanic students, without providing them with an opportunity to attend an integrated general high school in the Chicago public school system which is equivalent to the opportunity provided by Board Report No. 77-212-16 (Revised), as modified by this Court's order of August 12, 1977.

2. That plaintiffs recover of defendant, Board of Education of the City of Chicago, their costs herein.

3. That a ruling on plaintiffs' petition for attorneys' fees shall be and is reserved.

DATED at Chicago, Illinois, this 30th day of December, 1977.

/s/ *Hubert L. Will*
United States District Judge

APPENDIX D

Findings of Fact and Conclusions of Law by the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, et al.,

Defendants.

DARCEL MILTON, et al.,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, et al.,

Defendants.

No. 75 C 995 and No. 75 C 996 — Consolidated

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

These actions having come on for trial by the Court, without a jury, on plaintiffs' complaints, and on defendants' answers thereto, and the parties having stipulated to certain facts by means of a pretrial order entered herein on May 23, 1977 and a First Amendment thereto entered herein on July 29, 1977, and additional evidence submitted by and on behalf of the parties having been made a part

of the record herein, and the Court having heard the arguments of counsel with respect thereto, the Court, pursuant to Rule 52, Fed.R.Civ.P., hereby finds the facts and states its conclusions of law as follows:

Findings of Fact

1. Morgan Park High School, 1744 W. Pryor Avenue (11200 South), Chicago, and Gage Park High School, 5630 S. Rockwell Avenue (2600 West), Chicago, are public high schools owned and operated by the Board of Education of the City of Chicago.

2. Plaintiffs in *Johnson* v. *Board of Education* are black children who reside in the Morgan Park attendance area, and their parents. Plaintiffs in *Milton* v. *Board of Education* are black children who reside in the Gage Park attendance area, and their parents. But for the "student racial stabilization plans" freezing enrollment and establishing racial quotas instituted and applied by defendant Chicago Board of Education, all eighth-grade students residing in the Gage Park or Morgan Park attendance areas would have been offered the opportunity to attend Gage Park or Morgan Park High School.

3. In 1975, Gage Park High School was approximately 41% white and 59% minority, while Morgan Park High School was 37% white and 63% minority. The comparable figures for 1976 are 42% white and 58% minority for Gage Park and 38% white and 62% minority for Morgan Park. Black children attending Gage Park and Morgan Park are thus attending school in an integrated setting.

4. The Morgan Park High School and Gage Park High School attendance areas were in part undergoing accelerated racial change from white to black in 1975-1976. The schools were also over capacity because of increasing enrollment.

5. During the period from 1972 to 1975, black student enrollment at Morgan Park had increased from 52.3% to 62.3% and white student enrollment had declined from 45.7% to 36.9%. In this same period, total enrollment increased from 3092 to 3423. As of January 30, 1976, enrollment at Morgan Park High School was 3323 and the school was operating at 128.6% of capacity of permanent facilities. The racial composition of all students attending public and non-public elementary schools residing in the Morgan Park attendance area in 1976 was 6842 black, 7312 white, and 144 other.

6. During the period from 1972 to 1974, black student enrollment at Gage Park had increased from 1056 to 1361. As of January 30, 1976, enrollment at Gage Park High was 2441 and the school was operating at 106% of capacity. The racial composition of all students attending public and non-public elementary schools residing in the Gage Park attendance area in 1975 was 5235 black, 8617 white, 1174 Hispanic and 110 other.

7. On May 14, 1975, the Board of Education of the City of Chicago adopted a student racial stabilization plan establishing a ceiling on enrollment and a racial quota with respect to admissions to Gage Park High School. Under this quota plan, the racial composition of Gage Park High School was to be 48% black, 42% white, 8% Hispanic and 2% principal's option with the selection of incoming freshmen students to be made by lottery.

8. The Board adopted an enrollment ceiling and racial stabilization quota plan for Morgan Park High School on March 10, 1976, that differs in two respects from that applied to Gage Park. The Morgan Park plan set a 50% white and 50% black quota with respect to each entering class, rather than the school as a whole. In addition, the Morgan Park quota plan provides for the admission of a

maximum of 350 black students even if less than 350 white students apply. By contrast, the Gage Park plan admits black students to the extent that sufficient numbers of white students are in attendance so that the requisite overall 48 to 42 black-to-white ratio can be maintained.

9. The first lottery, in preparation for the 1975 school year at Gage Park High School, was held on June 2, 1975. Since the racial percentages were to be applicable to the school as a whole rather than to the incoming class, the entering class at Gage Park in September 1975 was in actual fact 43% white (267/615), 42% black (259/615) and 14% Hispanic (85/615).

10. The Gage Park racial quota plan was also applied to the class entering Gage Park High School in September 1976, with the applicable lottery drawing held on January 19, 1976. The entering class in 1976 as determined by the drawing was 44% white (229/519), 43% black (224/519) and 12% Hispanic (61/519).

11. A student racial/ethnic survey dated October 29, 1976, and conducted by the Board of Education, shows that the entering freshman class of September 1976 at Gage Park was in fact 42.6% white (228/535), 45.4% black (243/535) and 11.4% Hispanic (61/535). In 1975 and 1976, all freshmen attended the Gage Park High School "branch," which is on the same campus as Gage Park High School, is part of the permanent facility, and is used for freshmen only.

12. The Board's stated purpose for adoption of the racial quotas was to prevent overcrowding and to prevent Gage Park and Morgan Park High Schools from becoming increasingly black. Consequently, the quota for admission of black students at each school was necessarily set at a lower level than that at which black students would have applied and been admitted but for the quota.

13. No white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students have been denied admission annually since the racial quotas were instituted.

14. Under the racial quota plans, separate lottery lists are made for white, black and (in the case of Gage Park) Hispanic students. Students are admitted to Gage Park or Morgan Park High Schools, as the case may be, in the order their names appear on the applicable lottery lists until the quota for their race is filled.

15. The group of students accepted into Gage Park for the September 1975 school year included all those names down to a red line on the lottery list for each race. The red line appears immediately below the last name on the white list, No. 289. By contrast, the red line appears below name No. 200 on the black list, which has a total of 498 names, indicating the exclusion as of that date of 298 black applicants.

16. Within two weeks thereafter, an additional 60 black elementary students were given the option to enroll into Gage Park High School. By October 1, 1975, all of the original 498 black students had been offered the option of enrolling in Gage Park High School. Another 212 black students, who applied for admission after the lottery of June 2, 1975, were not offered the option of enrolling into Gage Park High School. Each of the 136 additional white students applying for admission after June 2, 1975 was admitted.

17. With respect to the January 1976 Gage Park drawing for the September 1976 school year, a red line again appears immediately below the last name on the white list, No. 309. By contrast, the red line appears below name No. 300 on the black list, which has a total of 626

names, indicating the exclusion at the time of the drawing of 326 black applicants.

18. With respect to the Gage Park lottery for the September 1976 school year, all 309 white students included in the January 19, 1976 drawing, and all 181 white students applying thereafter were offered the opportunity to enroll at the time of the lottery drawing or at the time they applied. Of the 626 black students included in the lottery drawing and the 210 additional black students applying thereafter, 300 black students were permitted to enroll and 243 actually attended Gage Park High School. At least 411 black students were excluded from Gage Park High School as of October 12, 1976 as a result of the racial quota.

19. The lottery to determine September 1976 admissions to Morgan Park High School was held on April 30, 1976. As of October 29, 1976, 538 black and 490 non-black students were eligible to apply to the 1976 freshman class. As of May 10, 1976, ten days after the drawing, every white student but one was offered the option to enroll in Morgan Park. The highest lottery number offered the option to enroll of 484. The one exception was Arlene Mickley, who apparently was never assigned a lottery number, and who was notified of her admission to Morgan Park on May 11, 1976. An additional 33 white students applying as transfer students thereafter were also admitted to Morgan Park High School.

20. In the 1976 Morgan Park lottery, as of May 10, 1976, 350 black students were offered the option to enroll in Morgan Park, the option to enroll with the highest lottery number then offered being No. 368. One hundred and thirty-one (131) black students were denied admission as of that date. As of October 29, 1976, the number of black students denied admission was 126, which included 15 black transfer students. No white student was ever denied ad-

mission to Morgan Park as a result of the 1976 lottery. The number of students actually admitted to Morgan Park High School as freshmen in September 1976 (as of October 29, 1976) was 350 black and 272 non-black.

21. Students denied admission as a result of the racial quotas are placed on a "waiting list," and are offered the opportunity to attend Morgan Park or Gage Park High Schools in the event another student of the same race, previously admitted to the school, elects not to attend, and with respect to Gage Park High School, if additional white students elect to attend so that additional black students may be admitted and still maintain the prescribed racial balance.

22. With respect to the Morgan Park lottery, 33 of the black students on the waiting list were offered the opportunity to enroll on or after September 27, 1976 (some as late as October 13, 1976), several weeks after the beginning of school. A number of such students, who were attending other schools at that time, declined the opportunity to transfer to Morgan Park.

23. At the time the student racial stabilization quota plans were adopted, there were substantially more white students than black students in public and non-public elementary schools in the Morgan Park and Gage Park attendance areas. However, it became apparent after the plans were in operation that the number of white students seeking admission at each high school was less than the quota set for white students and that the number of blacks and Hispanic students applying exceeded the quotas for those groups.

24. Students denied admission as a result of the racial quota plans as originally adopted by the Board were permitted to attend any "under-utilized" Chicago public high school. These under-utilized schools are the same schools

which under the provisions of Board Report No. 75-494-10 (adopted April 30, 1975), a Permissive Transfer Program, every child attending an over-utilized high school in the City of Chicago (which includes Gage Park and Morgan Park High Schools) was given the option of attending. Thus, under this Program, prior to and irrespective of the racial quota plans, Gage Park and Morgan Park High School students could have elected to attend these under-utilized schools.

25. Until the Board adopted a revised voluntary transfer program in July 1977, as described in Finding No. 39, excluded students residing in the Morgan Park and Gage Park attendance areas were required to travel to alternative schools using public transportation. Carfare was provided to students excluded from Gage Park High School commencing in September or October 1976, and for students excluded from Morgan Park High School from the inception of the racial quota for that school.

26. These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school. The racial balance at Gage Park High School is 45.4% black, 41.9% white, 12.7% other, and the racial balance at Morgan Park High School is 59% black and 41% white. The enrollment at Gage Park has been reduced to 2102 and the school is operating at 91.3% of capacity. The Morgan Park enrollment has been reduced to 2613 and the school is operating at 101.2% of capacity.

27. The following is the racial composition of the eighteen general high schools listed as available to those denied admission as a result of the racial quotas:

School	1975 Racial %			1976 Racial %		
Mather	93.0W;	1.4B;	1.7H	89.6W;	1.2B;	2.9H
Roosevelt	77.9W;	6.0B;	9.7H	76.0W;	2.7B;	12.6H
Sullivan	77.2W;	7.0B;	8.3H	73.4W;	8.2B;	8.8H
Von Steuben	67.8W;	10.3B;	14.2H	63.2W;	7.4B;	18.4H
Lake View	47.3W;	2.6B;	44.8H	43.6W;	3.3B;	47.1H
Senn	47.3W;	15.7B;	22.6H	44.0W;	15.3B;	24.3H
Kenwood	26.6W;	66.3B;	2.8H	26.4W;	66.7B;	2.8H
Wells	18.6W;	23.0B;	57.5H	16.3W;	23.7B;	59.5H
Tilden	11.6W;	75.7B;	12.6H	11.1W;	76.8B;	11.8H
Waller	10.2W;	70.2B;	17.9H	9.1W;	72.3B;	17.4H
Harrison	5.0W;	59.8B;	35.0H	5.1W;	42.4B;	52.2H
Farragut	2.2W;	82.9B;	14.8H	1.5W;	83.4B;	15.1H
Manley	0W;	99.9B;	.1H	0W;	99.9B;	0H
Marshall	0W;	100.0B;	0H	0W;	100.0B;	0H
Crane	0W;	99.9B;	.1H	0W;	99.8B;	.2H
DuSable	0W;	100.0B;	0H	0W;	100.0B;	0H
Hyde Park	0W;	100.0B;	0H	0W;	99.7B;	.3H
Carver	0W;	100.0B;	0H	0W;	100.0B;	0H

28. Of these eighteen under-utilized schools, six have significant white enrollments. These are Roosevelt (78%/76% white in 1975/1976), Von Steuben (68%/63% white), Mather (93%/90% white), Sullivan (77%/73% white), Lakeview (47%/44% white) and Senn (47%/44% white). These schools are located on the north side of the City of Chicago. None is south of 4000 North and three are north of 5800 North. By contrast, Gage Park High School is located at 5600 South and Morgan Park is at 11200 South. The closest of these schools (Lakeview) is 11.4 miles from Gage Park and 18.15 miles from Morgan Park High School.

29. Travel to the schools listed in Finding No. 27 from Gage Park or Morgan Park High Schools involves (1) taking a bus to the Dan Ryan rapid transit line; (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines; (3) travel on the Howard or Ravenswood rapid transit lines and, in two instances, (4) an additional bus trip to the school.

30. The following is a table of schools attended by 317 of the 416 black students excluded as a result of the 1975 Gage Park lottery. Data with respect to the 99 additional black students is not readily available:

Schools attended by 317 black students excluded from Gage Park under 1975 racial quota

Harper	0W;	99.9B;	0H	139
Hyde Park	0W;	100B;	0H	31
Dunbar	0W;	99.6B;	0H	23
Englewood	0W;	99.9B;	0H	18
King	0W;	100B;	0H	17
DuSable	0W;	100B;	0H	13
C.V.S.	0W;	99.8B;	.2H	8
South Shore	.1W;	99.5B;	.3H	7
Lindblom	.1W;	97.2B;	.1H	7
Crane	0W;	99.9B;	.1H	6
Tilden	11.6W;	75.7B;	12.6H	5
Calumet	0W;	99.9B;	0H	4
Hubbard	93.9W;	0B;	3.9H	4
Farragut	2.2W;	82.9B;	14.8H	3
Harrison	5.0W;	59.8B;	35.0H	3
Curie	77.8W;	16.8B;	5.8H	3
Parker	0W;	99.8B;	.2H	3
Hirsch	0W;	99.6B;	.3H	3
Austin	.2W;	99.6B;	.2H	2
Phillips	.1W;	99.9B;	0H	2
Harlan	.1W;	99.9B;	0H	2
Fenger	1.2W;	96.7B;	2.0H	2
Julian	.2W;	99.7B;	.1H	1
Tubman Fam.Lvg Ctr	0W;	100B;	0H	1
Manley	0W;	99.9B;	.1H	1
Moseley Soc.Adj.Sch.	0W;	89.8B;	10.2H	1
Bousfield Soc.Adj.Sch.	0W;	100B;	0H	1
Orr	5.0W;	78.6B;	15.9H	1
Jones Commercial	10.6W;	62.6B;	22.8H	1
Waller	10.2W;	70.2B;	17.9H	1
Metro	46.7W;	45.6B;	4.6H	1
Young	34.0W;	44.5B;	15.9H	1
Schurz	78.3W;	1.4B;	18.8H	1
Kelly	82.7W;	.1B;	16.7H	1
			TOTAL	317

31. The following is a list of schools attended by students excluded as a result of the 1976 Gage Park lottery:

Schools attended by those excluded from Gage Park under 1976 quota

Hyde Park	0W;	99.7B;	.3H	90
DuSable	0W;	100B;	0H	73
Collins	.1W;	98.8B;	1.1H	65
Harper	0W;	99.9B;	0H	61
Dunbar	0W;	99.5B;	.4H	37
Harrison	5.1W;	42.4B;	52.2H	34
Lindblom	.1W;	99.7B;	.2H	33
Tilden	11.1W;	76.8B;	11.8H	33
Kenwood	26.4W;	66.7B;	2.8H	25
Simeon	0W;	100B;	0H	23
C.V.S.	.5W;	99.1B;	.4H	14
Englewood	0W;	99.8B;	.2H	9
Curie	75.7W;	17.2B;	6.5H	7
Calumet	0W;	99.6B;	.4H	5
Parker	0W;	100B;	0H	5
King	0W;	100B;	0H	4
Colley	0W;	99.8B;	.2H	3
Phillips	0W;	99.9B;	0H	3
Jones Commercial	7.4W;	70.6B;	21.5H	3
Austin	.1W;	99.7B;	.1H	2
Corliss	0W;	99.9B;	.1H	1
Crane	0W;	99.8B;	.2H	1
Harlan	0W;	99.9B;	0H	1
Hirsch	0W;	99.6B;	.3H	1
Westinghouse	0W;	100B;	0H	1
Orr	3.7W;	79.7B;	16.5H	1
Waller	9.1W;	46.7B;	6.0H	1
Young	28.9W;	52.7B;	14.7H	1
Kelly	78.1W;	.1B;	21.2H	1
Prosser	73.2W;	10.8B;	14.1H	1
			TOTAL	539

32. As of September 20, 1976, 193 black students had been excluded as a result of the 1976 Morgan Park racial quota. Two of these students attended Kenwood (27%/26% white), while the remaining 191 attended schools which were over 99% minority. Nearly all the excluded students not attending a special technical or vocational high school (110 of 117 students) attended Carver High School, the closest under-utilized school to Morgan Park.

33. Students excluded from Gage Park and Morgan Park High Schools as a result of the 1975 and 1976 racial quota plans were permitted to attend only under-utilized schools, with "under-utilized" defined to mean a school with a total student enrollment below "the city-wide percent of capacity" of 101.3%.

34. In 1975, 22 of 51 general high schools were above the level of 101.3% utilization (excluding so-called "temporary facilities"). In 1976, 29 of 51 general high schools were above that level.

35. As a consequence of the criteria limiting black students excluded from Morgan Park and Gage Park High Schools to "under-utilized" schools—*i.e.*, schools with total enrollments below 101.3% (Finding No. 33)—such students were not permitted to attend any of the following schools: Kelly (82.7%/78.1% white; 138.5%/141.5% utilization); Kennedy (89.8%/89.0% white; 127.7%/110.4% utilization); Bogan (99.2%/97.4% white; 130.4%/126.6% utilization); Hubbard (93.9%/93.4% white; 127.3%/110.1% utilization); Washington (94.3%/93.3% white; 119.6%/115.8% utilization); Amundsen (83.4%/80.1% white; 104.2%/108.5% utilization [1975/76]); Foreman (95.7%/95.2% white; 127.8%/127.4% utilization); Kelvyn Park (65.4%/58.2% white; 118.6%/126.1% utilization); Schurz (78.6%/75.3% white, 101.3%/103.9% utilization); or Steinmetz (92.5%/

90.9% white, 116.4%/115.9% utilization). Some of these schools are more accessible to excluded Gage Park and Morgan Park students' homes than the white or integrated "under-utilized" schools which have been made available to them.

36. On January 21, 1977, a lottery drawing was held for the September 1977 freshman class in Gage Park High School. Of 754 black children in the lottery drawing, 425 were accepted as enrollees and 329 were denied admission. Of 85 Hispanic students, 30 were accepted and 50 were denied admission. Not one of the 364 white students who applied was denied admission.

37. On February 3, 1977, a lottery drawing was held for the September 1977 freshman class in Morgan Park High School. Six hundred ten white students and 612 black students had their names included in the lottery drawing. In April 1977, each white child who wished to attend Morgan Park High School was notified of his admission; the total number admitted was 317. At the same time, 350 black children were notified of their admission, and 157 black children who wished to attend the school were excluded.

38. On June 29, 1977, this case came on for trial, plaintiffs appearing with their witnesses. At that time counsel for the Board indicated that a modification of the racial quotas was being proposed to the Board of Education and that the Board would waive its right to present any evidence not already in the record. The Board also stipulated to certain additional facts, and both sides rested. The Court then stated that it was prepared to find the racial quotas as originally adopted to be unconstitutional, but would reserve final ruling pending any modification the Board might wish to present.

39. On July 13, 1977, the Board of Education adopted Board Report No. 77-212-16 (Revised), which modified the Gage Park and Morgan Park racial quota plans by providing excluded black and Hispanic students the option of attending certain North Side predominantly white and integrated schools by means of bus transportation provided by the Board of Education.

40. The following schools were made available to excluded Gage Park and Morgan Park black children under Board Report No. 77-212-16 (Revised):

Receiving School	No. of students who may transfer from Gage Park High School attendance area	No. of students who may transfer Morgan Park High School attendance area
Roosevelt	130	50
Taft	50	—
Von Steuben	92	50
Mather	100	50
Sullivan	100	50
Curie	50	50
Lane Technical	100	50
Schurz	150	40
Senn	200	—
Lake View	140	50
	150*	
TOTAL:	1,262	390

* Places originally designated for Metropolitan High School.

41. By this Court's order of August 12, 1977, the Board was directed to implement procedures for publicity and student counseling with respect to the alternatives provided by Board Report No. 77-212-16 (Revised), and to provide that designated places at the alternative schools which were not filled by students excluded from one school

(*e.g.*, Morgan Park) would be made available to students excluded from the other school (*e.g.*, Gage Park).

42. As of October 12, 1977, 102 of the 1632 students excluded as a result of the Morgan Park and Gage Park racial quotas had availed themselves of the opportunity provided by Board Report No. 77-212-16 (Revised). The following is the number of students attending each alternative school:

PARTICIPATING STUDENTS FROM MORGAN PARK AREA

Receiving School	Number of Buses	Number of Passengers	Bus Cost Per Day
Von Steuben)	1	32	
Lane)		3	$120
Roosevelt	1	23	120
Curie	1	10	120
Subtotals:	3	68	$360

PARTICIPATING STUDENTS FROM GAGE PARK AREA

Curie	2	9	$ 240
Roosevelt)			
Von Steuben)	1	8	120
Lane)	1	1	
Lake View)		16	120
Subtotal:	4	34	$ 480
TOTALS:	7 Buses	102 Students	
COSTS:	Bus Cost		$ 840
	Aides		174
			$1014 per day

Cost per student per day: $9.94.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter hereof by reason of 28 U.S.C. §§ 1331, 1343 and 2201, and 20 U.S.C. § 1706.

2. The defendant Board of Education of the City of Chicago is a body politic and corporate, and an agency of the State of Illinois, and may be sued as such.

3. The racial quota as originally adopted by the defendant Board deprived at least some of the plaintiffs of their rights under the Constitution of the United States and their rights under 42 U.S.C. §§ 1981 and 1983 and 20 U.S.C. § 1703(c), in that they did not give excluded students a viable opportunity to attend other integrated schools.

4. Those plaintiffs who were adversely and unlawfully affected by the racial quota plans as originally adopted were made to suffer irreparable injury for which there was no adequate remedy at law.

5. The so-called "voluntary transfer" plan adopted by the Board on July 13, 1977 as subsequently modified, restored to those plaintiffs who were adversely and unlawfully affected by the racial quota plans their rights under the Constitution of the United States and under 42 U.S.C. §§ 1981 and 1983 and 20 U.S.C. § 1703(c), in that under said voluntary transfer plan there was made available to such plaintiffs a meaningful opportunity to attend a Chicago public high school in an integrated setting.

6. The aforesaid voluntary transfer plan was adopted by the Board only after plaintiffs had filed their complaints herein, engaged in substantial discovery, and had answered ready for trial on the merits, and only after said trial was commenced and the Court indicated that it was prepared to find the racial quota plans as originally adopted to be unconstitutional, and said voluntary transfer plan would not

have been adopted but for the efforts of plaintiffs and their counsel.

7. Plaintiffs and others similarly situated would suffer irreparable injury if the voluntary transfer plan, adopted by the Board as a result of the instant suit, were modified or abandoned.

8. It is desirable and appropriate that the Board continue in this way and to that end the Board of Education will be enjoined to maintain and continue said plans, as modified, incorporating provisions for the voluntary busing of excluded students living in the Morgan Park or Gage Park areas to alternative integrated public high schools.

9. A permanent injunction will issue directing or requiring defendants to maintain and continue a transfer plan equivalent to the plan set forth in Board Report No. 77-212-16 (Revised).

10. Plaintiffs are entitled to recover their costs herein.

11. The Court reserves ruling on plaintiffs' petition for attorneys fees.

DATED at Chicago, Illinois, this 30th day of December, 1977.

/s/ *Hubert L. Will*
United States District Judge

APPENDIX E

Order of the District Court on Attorneys Fees

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KATHY SUE JOHNSON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

and

DARCEL MILTON, et al.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Defendants.

---

76 C 995 and 76 C 996 (Consolidated)

ORDER

Whereas plaintiffs have filed a Petition for costs and attorneys' fees, and the Court having considered said Petition and the submissions of the parties in connection therewith,

IT IS ORDERED THAT

1. Plaintiffs shall recover from defendant Board of Education of the City of Chicago the sum of $908.31, as their costs and out-of-pocket expenses in this matter;

2. Plaintiffs shall recover from defendant Board of Education of the City of Chicago the additional sum of $1,000, as a witness fee for their expert witness, Professor Karl E. Taeuber; and

3. Plaintiffs' Petition for Attorneys' Fees is otherwise hereby denied.

Dated at Chicago, Illinois
this 23rd day of January, 1978.

/s/ *Hubert L. Will*
United States District Judge

No. 79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1979

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,
Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

JOINT APPENDIX

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Petition for certiorari filed
March 5, 1980
Petition for certiorari granted
July 2, 1980

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NOTE: The opinions of the District Court and Court of Appeals are reproduced in the Appendices to the Petition for Certiorari.

DOCKET ENTRIES

Johnson v. Board of Education

76 C 995

Date	Proceedings
3-15-76	Filed complaint and two copies.
3-15-76	Filed civil cover sheets.
3-15-76	Filed affidavit re Gen. rule 39(2).
3-15-76	Filed appearance of attorneys for plaintiffs (2).
3-17-76	Issued summons and two copies with two copies of complaint as to defendants Joseph Hannon and Board of Education, re, note of attorneys.
3-26-76	Filed summons returned served on Joseph P. Hannon and Board of Education 2 services.
4- 8-76	Filed appearance of defendants and that of their attorney Michael J. Murray.
4- 9-76	Filed plaintiffs' notice of filing interrogatories.
4- 9-76	Filed plaintiffs' interrogatories first set.
4- 9-76	Filed defendants' notice of motion with motion for extension of time in which to file answer.
4-12-76	Enter order dated April 9, 1976: Enter order. Defendants' motion for extension of time of 14 days in which to file answer, to and including April 26, 1976 granted. —Will, J.
	Mailed notices 4-12-76.
4-26-76	Filed defendants' answer.

4-29-76 Filed plaintiffs' notice of motion.

4-29-76 Filed plaintiffs' motion for temporary restraining order.

4-30-76 Enter order dated April 29, 1976: Enter order—Plaintiffs' motion for temporary restraining order is denied. —Will, J.

Mailed notices 4-30-76.

5-11-76 Filed defendants' answers to interrogatories.

5-21-76 Filed Plaintiffs' notice of filing interrogatories.

5-21-76 Filed Plaintiffs' interrogatories to defendants. (Second Set).

6- 7-76 Enter order dated June 3, 1976: Order cause set for preliminary pre-trial conference on June 16, 1976 at 9:30 a.m. pursuant to Judge Will's standing order re: pre-trial conferences, section I. —Will, J.

Mailed notices 6-3-76.

6-17-76 Enter order dated June 16, 1976: Preliminary pre-trial conference held. Order cause placed on the September 1976 status call. (September 20, 1976). —Will, J.

Mailed notices 6-17-76.

7-9-76 Filed defendants' answers to interrogatories, Second set.

7-21-76 Filed plaintiffs' motion to compel answers to interrogatories.

7-21-76 Filed affidavit under Local Rule 12 (d).

7-22-76 Filed plaintiffs' notice of motion.

7-23-76 Enter order dated 7-22-76; Defendants given 10 days to respond to plaintiffs' motion to compel answers to interrogatories, reply due 10 days thereafter. Cause continued before Hon. Judge Hubert Will for further scheduling to September 20, 1976 at 10:00 a.m. —PARSONS, J.

Mailed notices 7-23-76.

7-22-76 Filed plaintiffs' notice of motion.

7-22-76 Filed plaintiffs' motion for leave to add additional parties plaintiff.

7-23-76 Enter order dated 7-22-76; Plaintiffs' motion for leave to add additional parties plaintiffs' is entered and continued before Hon. Judge Hubert Will to September 20, 1976 at 10:00 a.m. —PARSONS, J.

Mailed notices 7-23-76.

7-29-76 Filed Notice of Filing.

7-29-76 Filed Plaintiffs' further Motion for leave to add additional parties plaintiff.

8-3-76 Filed Memorandum in opposition to plaintiffs' motion to compel answers to certain interrogatories; certificate of service.

8-16-76 Filed Notice of filing.

8-16-76 Filed defendants' reply memorandum in support of motion to compel answers to certain interrogatories.

8-17-76 Filed Notice of Filing; certificate of service.

8-17-76 Filed Plaintiff's Motion for preliminary injunction or in the alternative for summary judgment.

8-17-76 Filed Memorandum in support of motion.

8-17-76 Filed Exhibits & Affidavit in support of motion (1 vol.).

8-18-76 Filed Notice of Motion.

8-18-76 Filed Plaintiffs' Motion for expedited briefing schedule.

8-19-76 Enter order dated 8-18-76: Plaintiffs' motion for expedited briefing schedule, granted; defendants answer brief due to be filed by August 25, 1976; plaintiff's reply by August 30, 1976. —MARSHALL, J.

Mailed Notices 8-19-76.

8-27-76 Filed defendants' notice of motion with motion to extend time attached.

8-30-76 Enter order dated August 27, 1976: Leave to defendants to file their memorandum in opposition to plaintiffs' motion for preliminary injunction to and including August 30, 1976. —Marshall, J.

Mailed notices 8-30-76.

8-31-76 Filed Defendants' Memorandum in opposition to plaintiffs' motion for preliminary injunction or in the alternative for summary judgment.

9-1-76 Filed Notice of filing.

9-1-76 Filed Reply Memorandum in support of motion for preliminary injunction or in the alternative for summary judgment, by plaintiffs.

9-22-76 Enter order dated September 20, 1976: Order plaintiffs' motion for summary judgment is denied. Order plaintiffs' motion to compel answers to interrogatories is granted. Order defendants to answer interrogatories within 10 days. Order plaintiffs' further motion to add additional parties is granted. Order cause continued to October 6, 1976 at 10:00 a.m. for report on status. —Will, J.

Notices mailed 9-22-76.

9-30-76 Filed defendants' answers to certain interrogatories.

10-7-76 Enter order dated October 6, 1976: Order cause set for pretrial conference on November 3, 1976 at 4:30 p.m. —Will, J.

Notices mailed 10-7-76.

11-5-76 Enter order dated November 3, 1976: Pretrial conference held. Order cause set for December 6, 1976 at 10:00 a.m. for report on status. —Will, J.

Notices mailed 11-5-76.

11-8-76 Filed defendants' response to request for supplementation of responses.

12-8-76 Enter order dated December 6, 1976: Order cause placed on the January 1977 status call (January 3, 1977) —Will, J.

Notices mailed 12-8-76.

1-3-77 Filed plaintiffs' notice of motion.

1-3-77 Filed plaintiffs' motion for hearing on preliminary injunction; exhibits.

1-5-77 Enter order dated January 3, 1977: Plaintiffs' motion for preliminary injunction will be set for hearing within short date. —Will, J.

Notices mailed 1-5-77.

2-8-77 Filed plaintiffs' notice of motion.

2-8-77 Filed plaintiffs' motion to incorporate documents as part of the record.

2-10-77 Enter order dated February 8, 1977: Plaintiffs' motion to incorporate documents as part of the record is granted. Order cause set for final pretrial conference on March 23, 1977 at 4:30 p.m. —Will, J.

Notices mailed 2-10-77.

2-11-77 Enter order dated February 10, 1977: On court's own motion order final pretrial conference now set for March 23, 1977 is reset to March 24, 1977 at 4:30 p.m. —Will, J.

Notices mailed 2-11-77.

3-24-77 Filed defendants' motion to dismiss certain plaintiffs.

3-29-77 Enter order dated 3-24-77, Final pre-trial conference held. Order cause set for May 6, 1977 for entry of final pre-trial order. WILL, J.

Mailed notices 3-29-77

5-4-77 Filed defendants' notice.

5-4-77 Filed defendants' motion for extension of time for pre-trial order.

5-5-77 Enter order dated 5-4-77, On motion of defendants order cause reset from May 6, 1977 to May 20, 1977 for entry of final pre-trial order. WILL, J.

Mailed notices 5-5-77

5-23-77 Enter order dated 5-20-77, Final pre-trial order entered. (DRAFT) Order cause set for May 27, 1977 for report on status. WILL, J.

Mailed notices 5-23-77

6-1-77 Enter order dated 5-27-77, Order cause placed on the list of cases held for trial. WILL, J.

Mailed notices 6-1-77

6-29-77 Filed plaintiffs' statement of additional facts.

7-1-77 Enter order dated 6-29-77, First amendment to final pre-trial order entered. (DRAFT) Order cause taken under advisement. WILL, J.

Mailed notices 7-1-77

7-26-77 Enter order dated 7-26-77, On court's own motion order cause set for August 5, 1977 for report on status. WILL, J.

Mailed notices 7-26-77

8-9-77 Enter order dated 8-5-77, Order cause contd to Oct. 7, 1977 for report on status. WILL, J.

Mailed notices 8-9-77

8-23-77 Enter order dated 8-5-77, Order certain provisions will be implemented by defendants in connection with Board Report no. 77-212-16 (revised) relating to Voluntary transfer of students from Gage Park and Morgan High School attendance areas etc. (DRAFT) WILL, J.

Mailed notices 8-23-77

10-12-77 Enter order dated 10-7-77, Order cause contd to Oct. 14, 1977 for report on status. WILL, J.

Mailed notices 10-12-77

10-14-77 Filed plaintiffs' notice of motion.

10-14-77 Filed plaintiffs' petition for attorneys fees.

10-14-77 Filed affidavit of Shalom L. Kohn.

10-14-77 Filed affidavit of Thomas H. Morsch.

10-14-77 Filed plaintiffs' notice of motion.

10-14-77 Filed plaintiffs' motion for entry of permanent injunction.

10-17-77 Enter order dated 10-14-77, Plaintiffs' petition for attorneys' fees taken under advisement, memo in support to be filed within 10 days; defendants' answering memo to be filed within 10 days thereafter and plaintiffs' reply memo to be filed within 5 days thereafter. WILL, J.

Mailed notices 10-17-77

10-14-77 Filed plaintiffs' notice of motion.

10-14-77 Filed plaintiffs' motion to incorporate documents as part of the record.

10-17-77 Enter order dated 10-14-77, Pltfs' motion to incorporate documents as part of the record is taken under advisement. Enter order. WILL, J.

Mailed notices 10-17-77

10-25-77 Filed plaintiffs' notice of filing.

10-25-77 Filed Memorandum in support of plaintiffs' petition for attorneys fees.

11-3-77 Filed defendants' notice of filing.

11-3-77 Filed objections of the Board of Education of The City of Chicago to plaintiffs' motion for attorneys' fees.

11-10-77 Filed plaintiffs' notice of filing.

11-10-77 Filed reply memorandum in support of plaintiffs' petition for attorneys fees.

11-29-77 Enter order dated 11-28-77, Defendants' motion for entry of findings of fact and conclusions of law contd to Dec. 1, 1977 at 10:00 a.m. WILL, J.

Mailed notices 11-29-77

11-29-77 Enter order dated 11-28-77, Plaintiffs' motion for entry of findings of fact and conclusions of law contd to Dec. 1, 1977 at 10:00 a.m. WILL, J.

Mailed notices 11-29-77

12-2-77 Enter order dated 12-1-77, Plaintiffs' and defendants' motion for entry of findings of fact and conclusions of law contd to Dec. 23, 1977. WILL, J.

Mailed notices 12-2-77

12-29-77 Enter order dated 12-23-77, Order cause continued to January 13, 1978 for ruling on motion for fees. WILL, J.

Mailed notices 12-29-77

1-5-78 Enter order dated 12-30-77, Enter findings of fact and conclusions of law. (DRAFT) Enter judgment order. Defendants are permanently enjoined etc. Plaintiffs recover costs. (DRAFT) WILL, J.

Mailed notices 1-5-78 JS-6

1-23-78 Filed Plaintiffs' Notice of Motion.

1-23-78 Filed Plaintiffs' Motion for Entry of Orders.

1-25-78 Enter order dated 1-23-78: Enter order: Plaintiffs to recover from defendant, Board of Education of the City of Chicago, $908.31 as their costs and out-of-pocket expenses and $1,000.00 as a witness fee for their expert witness, Professor Karl E. Taeuber. Plaintiffs Petition for attorneys fees is otherwise denied. (DRAFT). Order certain documents previously submitted to the court in connection with this matter be incorporated as part of the Record (DRAFT) WILL, J.

Mld Notices 1-24-78

1-30-78 Filed plaintiffs'-appellants notice of appeal.

1-30-78 Mailed copy of notice of appeal to Michael J. Murray.

2-8-78 Filed plaintiffs'-appellants designation of transcripts.

1-23-78 Filed documents incorporated into record by order of Jan. 23, 1978. (1 manila folder) & Feb. 8, 1977.

2-8-78 Filed defendants' exhibits 1 thru 39. (1 manila folder of loose exhibits)

2-8-78 Filed plaintiffs' exhibits 1 thru 77. (1 brown filing folder of loose exhibits) (excluding 55 thru 60)

2-9-78 Filed plaintiffs'-appellants requests for inclusion into complete record.

Milton v. Board of Education

76 C 996

Date	Proceedings
3-15-76	Filed complaint and two copies. (JS-5)
3-15-76	Filed Civil Cover sheet.
3-15-76	Filed appearance of Thomas H. Morsch and Shalom L. Kohn as attorneys for Plaintiffs with two affidavits pursuant to General Rule 39.
3-15-76	Filed Memo re summons: Only serve defendants, Joseph Hannon and Board of Education of Chicago.
3-17-76	Issued summons and two copies with two copies of Complaint for service on Joseph Hannon and Board of Education of Chicago.
5-26-76	Filed summons returned served on Joseph P. Hannon and Board of Education. 2 services
4-8-76	Filed appearance of Board of Education and officers and Joseph P. Hannon.
4-9-76	Filed plaintiffs' notice of filing.
4-9-76	Filed plaintiffs' interrogatories First set.
4-9-76	Filed defendants' notice of motion and motion for extension of time in which to file answer.
4-12-76	Enter order dated 4-9-76; Enter order defendants' motion for extension of time of 14 days in which to file answer, to and including April 26, 1976 granted. WILL, J.
	Mailed notices 4-12-76
4-26-76	Filed defendants' answer to complaint.
5-11-76	Filed defendants' answers to interrogatories.

5-21-76 Filed plaintiffs' notice of filing.

5-21-76 Filed plaintiffs' interrogatories, second set.

6-7-76 Enter order dated June 3, 1976: Order cause set for preliminary pre-trial conference on June 16, 1976 at 9:30 a.m. pursuant to Judge Will's standing order re: pretrial conferences, section I. Will, J.

Notices mailed 6-7-76

6-7-76 Filed plaintiffs' notice of filing first request for production of documents.

6-7-76 Filed plaintiffs' first request for production of documents.

6-17-76 Enter order dated 6-16-76; Preliminary pre-trial conference held. Order cause placed on the September 1976 status call (Sept. 20, 1976) WILL, J.

Mailed notices 6-17-76

7-9-76 Filed defendants' answers to interrogatories, second set.

7-21-76 Filed affidavit under Local Rule 12(d) by Shalom L. Kohn.

7-21-76 Filed plaintiffs' motion to compel answers to interrogatories.

7-22-76 Filed plaintiffs notice of motion.

7-23-76 Enter order dated 7-22-76; Defendants given 10 day to respond to plaintiffs motion to compel answers to interrogatories; reply due 10 days thereafter. Cause continued before Hon. Judge Hubert Will for further scheduling to September 20, 1976 at 10:00 a.m.—PARSONS, J.

Mailed notices 7-23-76

8-5-76 Filed memorandum in opposition to plaintiffs' motion to compel answers to certain interrogatories.

8-16-76 Filed plaintiffs' notice of filing.

8-16-76 Filed plaintiffs' reply memorandum in support of motion to compel answers to certain interrogatories.

8-17-76 Filed plaintiffs' notice of filing.

8-17-76 Filed motion for preliminary injunction or in the alternative for summary judgment.

8-17-76 Filed memorandum in support of motion for preliminary injunction, etc.

8-17-76 Filed exhibits and affidavit in support of motion for preliminary injunction, etc.

8-18-76 Filed plaintiffs' notice of motion.

8-18-76 Filed plaintiffs' motion for expedited briefing schedule.

8-19-76 Enter order dated 8-18-76; Plaintiffs' motion for expedited briefing schedule granted; defendants' answer brief due to be filed by August 25, 1976; plaintiffs' reply due August 30, 1976.—MARSHALL, J.

Mailed notices 8-19-76

8-27-76 Filed defendants' notice of motion; Motion for extension of time and supporting affidavit.

8-30-76 Enter order dated 8-27-76; Leave to defendants to file their memorandum in opposition to plaintiffs' motion for preliminary injunction to and including August 30, 1976. MARSHALL, J.

Mailed notices 8-30-76

8-31-76 Filed defendants' memorandum in opposition to plaintiffs' motion for preliminary injunction or in the alternative for summary judgment.

9-1-76 Filed plaintiffs' notice of filing.

9-1-76 Filed plaintiffs' reply memorandum in support of motion for preliminary injunction or in the alternative for summary judgment.

9-23-76 Enter order dated 9-20-76; Order plaintiffs' motion for summary judgment is denied. Order plaintiffs' motion to compel answers to interrogatories is granted. Order defendants to answer interrogatories within 10 days. Order plaintiffs' further motion to add additional parties is granted. Order cause continued to October 6, 1976 at 10:00 a.m. for report on status.—WILL, J.

Mailed notices 9-23-76

9-30-76 Filed defendants' answers to certain interrogatories.

10-7-76 Enter order dated 10-6-76; Order cause set for pre-trial conference on November 3, 1976 at 4:30 p.m.—WILL, J.

Mailed notices 10-7-76

11-5-76 Enter order dated 11-3-76; Pretrial conference held. Order cause set for December 6, 1976 at 10:00 a.m. for report on status.—WILL, J.

Mailed notices 11-5-76

11-8-76 Filed defendants' response to request for supplementation of responses.

12-9-76 Enter order dated 12-6-76; Order cause placed on the January 1977 status call (January 3, 1977.)—WILL, J.

Mailed notices 12-9-76

1-3-77 Filed plaintiffs' notice of motion.

1-3-77 Filed plaintiffs' motion for hearing on preminary injunction.

1-5-77 Enter order dated 1-3-77; Plaintiffs' motion for preliminary injunction will be set for hearing within short date.—WILL, J.

Mailed notices 1-5-77

2-8-77 Filed plaintiffs' notice of motion.

2-8-77 Filed plaintiffs' motion to incorporate documents as part of the record.

2-10-77 Enter order dated 2-8-77: Plaintiffs' motion to incorporate documents as part of the record is granted. Order cause set for final pre-trial conference on March 23, 1977 at 4:30 P.M.—WILL, J.

Mailed notices 2-10-77

2-14-77 Enter order dated 2-10-77; On Court's own motion order final pretrial conference now set for March 23, 1977 is reset to March 24, 1977 at 4:30 p.m.—WILL, J.

Mailed notices 2-11-77

3-28-77 Enter order dated 3-24-77; Final pretrial conference held. Order cause set for May 6, 1977 for entry of final pretrial order.—WILL, J.

Mailed notices 3-28-77

5-4-77 Filed defendants' notice.

5-4-77 Filed defendants' motion for extension of time for pretrial order.

5-5-77 Enter order dated 5-4-77; On motion of defendants order cause reset from May 6, 1977 to May 20, 1977 for entry of final pretrial order. WILL, J.

Mailed notices 5-5-77

5-23-77 Enter order dated 5-20-77; Final pretrial order entered. (DRAFT) Order cause set for May 27, 1977 for report on status.—WILL, J.

Mailed notices 5-23-77

6-1-77 Enter order dated 5-27-77: Order cause placed on the list of cases held for trial.—Will, J.

Mailed notices 6-1-77

7-5-77 Enter order dated 6-29-77: First amendment to final pre-trial order entered. (DRAFT) Order cause taken under advisement.—Will, J.

Mailed notices 7-5-77

7-27-77 Enter order dated 7-26-77: On court's own motion order cause set for August 5, 1977 for report on status.—Will, J.

Mailed notices 7-27-77

8-9-77 Enter order dated 8-5-77: Order cause continued to October 7, 1977 for report on status.—Will, J.
Mailed notices 8-9-77

8-23-77 Enter order dated 8-5-77: Order certain provisions will be implemented by defendants in connection with Board Report No. 77-212-16 (Re-

vised), relating to "Voluntary Transfer of Students From Gage Park and Morgan High School Attendance Areas" etc. (DRAFT)—Will, J.

Mailed notices 8-23-77

10-12-77 Enter order dated 10-7-77: Order cause continued to October 14, 1977 for report on status.—Will, J.

Mailed notices 10-13-77

10-14-77 Filed notice of motion.

10-14-77 Filed plaintiffs' motion to incorporate documents as part of the record.

10-17-77 Enter order dated 10-14-77: Enter order. Plaintiff's motion to incorporate documents as part of the record is taken under advisement.—Will, J.

Mailed notices 10-17-77

10-14-77 Filed notice of motion.

10-14-77 Filed plaintiffs' motion for entry of permanent injunction.

10-14-77 Filed notice of motion.

10-14-77 Filed plaintiffs' petition for attorneys fees.

10-14-77 Filed affidavit of Shalom L. Kohn.

10-14-77 Filed affidavit of Thomas H. Morsch.

10-17-77 Enter order dated 10-14-77: Plaintiffs' petition for attorneys' fees taken under advisement, memo in support to be filed within 10 days; defendants' answering memo to be filed within 10 days thereafter and plaintiffs' reply memo to be filed within 5 days thereafter.—Will, J.

Mailed notices 10-17-77

10-25-77 Filed notice of filing.

10-25-77 Filed plaintiffs' memorandum in support of plaintiffs' petition for attorneys fees.

11-3-77 Filed objections of the Board of Education of the City of Chicago to plaintiffs' motion for attorneys' fees.

11-3-77 Filed notice of filing.

11-10-77 Filed notice of filing.

11-10-77 Filed plaintiffs' reply memorandum in support of plaintiffs' petition for attorneys fees.

11-30-77 Enter order dated 11-28-77: Plaintiffs' motion for entry of findings of fact and conclusions of law continued to Dec. 1, 1977 at 10:00 A.M.—Will, J.

Mailed notices 11-30-77

12-5-77 Enter order dated 12-1-77: Plaintiffs' and defendants' motion for entry of findings of fact and conclusions of law continued to December 23, 1977.—Will, J.

Mailed notices 12-5-77

12-30-77 Enter order dated December 23, 1977; Order cause continued to January 13, 1978 for ruling on motion for fees.—WILL, J.

Notices Mailed 12-30-77

1-6-78 Enter order dated 12-30-77: Enter findings of fact and conclusions of law. (DRAFT) Enter Judgment Order. Defendants are permanently enjoined etc. plaintiffs recover costs. (DRAFT) —Will, J.

Mailed notices 1-5-78

1-23-78 Filed notice of motion.

1-23-78 Filed plaintiffs' motion for entry of orders.

1-25-78 Enter order dated 1-23-78: Enter ordtr: Plaintiffs to recover from defendant Board of Education of the City of Chicago $908.31 as their costs and out-of-pocket expenses and $1,000.00 as a witness fee for their expert witness professor Karl E. Taeuber. Plaintiffs' petition for attorneys' fees is otherwise denied. (Draft) Order certain documents previously submitted to the court in connection with this matter be incorporated as part of the record. (Draft)—Will, J.

Mailed notices 1-25-78

1-30-78 Filed plaintiff-appellants' notice of appeal. $5.00 pd. (consolidated with 76 C 995)

1-30-78 Mailed copy of consolidated notice of appeal to attorneys of record.

Court of Appeals

(No. 78-1215)

1978

3/16 Filed O&3c appellants' motion to file supplemental record; affd., svc.

3/20 Entered order granting motion of appellees to file supplemental record; District Court of Northern District of Illinois, Eastern Div. is directed to prepare, certify and transmit the transcript of proceedings for 6/27/77 a supplement to the record on appeal. And the supplement shall be filed with the clerk by 3/24/78.

3/22 Filed O&3c of appellant's motion to extend time; svc.

3/23 Entered order that time for filing appellants' brief be extended only to and including 4/11/78. Counsel is directed to comply with the affidavit and specificity requirements of C.R. 8(a).

4/11 Filed 15c of appellants' brief; and 10c appendix; svc.

4/11 Filed O&3c of motion for leave to file brief Amicus Curiae of the Lawyers' Committee for Civil Rights Under Law, Instanter; 15c brief tendered; svc.

4/14 Entered order granting motion for leave to file brief amicus curiae of the Lawyers' Committee for Civil Rights Under Law Instanter. The clerk is directed to file instanter the tendered fifteen (15) copies of the Brief *Amicus Curiae* of the Lawyers' Committee.

4/19 Filed 25c brief Amicus Curiae of The Lawyers' Committee for Civil Rights Under Law,svc., per order.

5/11 Filed 15c of brief of appellees; svc.

1978

5/25 Filed 15c appellants' reply brief, svc.

8/10 The Court, sua sponte, requests that the appellants and the appellees, by 8/31/78, file simultaneous supplemental briefs, not exceeding 15 typewritten double-spaced pages addressing the applicability of *University of California Regents* v. *Bakke,* 46 U.S. L.W. 4896 (June 28, 1978) to the facts of this case.

8/31 Filed 15c of appellants' supplemental brief; svc.

8/31 Filed 15c of supplemental brief for appellees; svc.

9/22 Entered order setting appeal for oral argument on Mon. 10/30/78 10:30 a.m.

Oral argument limited to 30 min. per/side.

10/30 Heard and taken under advisement.

11/15 Filed O&3c of appellees' motion to update record. svc.

11/17 Filed O&3c of appellants' response in opposition to motion to update record; svc.

11/21 Entered order granting motion of 11/15/78. Copies of the information contained in the motion to update record are to be distributed to the panel of judges that heard the oral argument of this appeal on Mon. 10/30/78.

11/29 Filed O&3c of appellants' motion for leave to file response; response tendered previously filed; svc.

11/30 Filed O&3c response to plaintiffs' motion for leave to file response, svc. (Board of Education)

12/5 Entered order granting appellants' motion of 11/30/78. The clerk of this court is directed to file herein instanter the 4 tendered copies of the

1978

response to the plaintiffs' motion for leave to file response. Copies of that response are to be distributed to panel of judges that heard the oral argument of this appeal on 10/30/78. Further ordered that response in opposition to motion to update record construed as a motion for reconsideration, is Denied on the ground that the appellees have responded to the appellants' objections and have provided the additional information requested in that response in opposition.

12/12 Filed O&3c of appellants' motion for leave to file reply to response to plaintiffs' motion for leave to file response; O&3c reply tendered; svc.

12/13 Filed O&3c of appellants' reply to response to plaintiffs' motion for leave to file response; dist., svc.

12/13 Entered order Granting appellant's motion of 12/12/78. The Clerk of this court is directed to file instanter the four tendered copies of the Reply To Response to Plaintiffs Motion for Leave To File Response.

1979

7/20 Filed O&3c of plaintiffs-appellants' motion for injunction; svc.

7/23 Filed O&3c of defendants-appellees' response in opposition to motion for injunction; svc.

7/27 Entered order that the motion for an injunction is DENIED.

8/13 Filed an opinion by Judge Bauer.

8/13 Entered final judgment order, AFFIRMING, with costs.

1979

8/27 Filed 25c appellants petition for rehearing, en banc, dist. svc.

9/7 Sent letter to counsel for the appellee to file an answer to the appellants' petition for rehearing en banc to be filed by Mon., 9/17/79. 25 copies of that answer will be required.

9/17 Filed 25c of appellee's response in opposition to petition for rehearing and suggestions for rehearing en banc; dist., svc.

10/23 Filed O&18c of appellant's additional authority; dist. en banc; svc.

12/6 Entered order that the petition rehearing is DENIED.

12/27 MANDATE ISSUED AND RECORD RETURNED.

1980

3/10 Filed notice of filing petition for cert. on 3/24/80; Supreme Court No. 78-1293.

75-553-2 May 14, 1975

REPORT OF THE COMMITTEE ON AREA B

TO THE MEMBERS OF THE BOARD OF EDUCATION
OF THE CITY OF CHICAGO:

The Area B Committee held a meeting with representatives of the Gage Park Advisory Council, the Local School Council and the P.T.A. on Tuesday, May 13, 1975, in the Board Members' Conference Room, and, as a result of that meeting, recommends the following items to the Board of Education:

1. That the maximum total enrollment of both the main and branch buildings be held to 2800 students.

2. That the racial composition of the student body be 48% Black, 42% White, 8% Spanish and 2% Principal's option.

3. That both of the above items become effective September, 1975.

4. That any student living in the Gage Park Attendance Area who cannot be accommodated at Gage Park High School be permitted to attend any under-utilized facility in the City.

Respectfully submitted,

COMMITTEE ON AREA B

(Signed) (MRS.) CAREY B. PRESTON, Chairman
(Signed) (MR.) THOMAS J. NAYDER, Member
(Abstained) MS. CARMEN VELASQUEZ, Member

76-271-1 March 10, 1976

SPECIAL REPORT RE: MORGAN PARK HIGH SCHOOL

TO THE MEMBERS OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO:

On August 27, 1975, Board Report 75-1041-2 was approved. Recommendation #2 contained therein read as follows:

2. "Reassessing the entire situation, including racial ratio, by January, 1976 in order to make further recommendations before parent-interview days in 1975-76 so that the goals cited herein may be realized."

In discussing the above item with the Morgan Park High School Community Council and staff, the undersigned recommend the following:

1. Maintain the existing enrollment goals of Board Report 75-1041-2.
2. Limit the incoming 9th graders to 700 students—50% black and 50% non-black.
3. Any student living in the Morgan Park attendance area who cannot be accommodated at Morgan Park will be permitted to attend any under-utilized facility in the city and/or any special vocational or technical school for which the student qualifies, with bus fare being provided for these students.

Respectfully submitted,

(Signed) Margaret Wild,
(Signed) Edgar G. Epps
(Signed) Bernard S. Friedman

77-212-16 (REVISED) July 13, 1977

VOLUNTARY TRANSFER OF STUDENTS FROM GAGE PARK AND MORGAN PARK HIGH SCHOOL ATTENDANCE AREAS

RECOMMENDATION:

That students residing in the attendance areas for Gage Park and Morgan Park High Schools not selected by the lottery system to attend these high schools, be allowed to attend the "receiving" high schools indicated below.

Students seeking to transfer to one of the receiving schools must be accepted with the following being the only exception—no child presently placed or recommended by a child study report for placement in a mentally handicapped division or social adjustment division should participate.

Students who meet the criteria noted in the first paragraph of this Board Report also have the option of attending any other high school designated as a receiving school.

Once students are accepted by a receiving school, they are to be considered members of that school's regular student body and, therefore, are not unilaterally transferable.

Students who choose to take advantage of this program will be transported from a convenient point in their residential area to the receiving school and brought back at the end of the school day. Buses for transportation will be provided by the Chicago public schools.

The following schools are included in this program:

Receiving School	No. of students who may transfer from Gage Park High School Attendance Area	No. of students who may transfer from Morgan Park High School Attendance Area
Roosevelt	130	50
Taft	50	—
Von Steuben	92	50
Mather	100	50
Sullivan	100	50
Curie	50	50
Lane Technical	100	50
Schurz	150	40
Senn	200	—
Lake View	140	50
	150*	
Total:	1,262	390

The number of students identified for transfer to receiving schools will not increase the enrollments of receiving schools beyond 105 percent of their operating capacities based on membership figures as of December 23, 1976 and a 10-period day schedule.

*Spaces have been reserved for only 90% of the total number of students who may transfer from Gage Park and Morgan Park High Schools attendance areas for the reason that past experience has shown that not all eligible students will take advantage of the opportunity. If the number of students seeking voluntary transfers exceeds the 90% space allocation, a subsequent recommendation will be made so that no eligi-

ble student from the Gage Park or Morgan Park High School attendance area who wishes to apply will be excluded.

Metropolitan High School has been removed from the list because it has a city-wide open enrollment at the present time, and the addition of 150 students would change its status as an integrated school.

DESCRIPTION:

To accommodate students not selected by the lottery system to attend Gage Park and Morgan Park high schools and to stabilize these neighborhoods.

SUPPORTIVE DATA:

This voluntary transfer program is being recommended as a way of accommodating students who were not selected by the lottery system to attend Gage Park and Morgan Park high schools. Some 1,262 Gage Park and 390 Morgan Park students were not selected by the lottery system.

In order to encourage students to participate in this program, the Chicago public schools will bear the cost of student transportation.

The schools involved in this program affect all racial/ethnic groups; thus they provide an opportunity to enhance racial integration on a voluntary basis and increase neighborhood stability.

A program to stabilize Gage Park area by specifying enrollment ceilings and racial quotas was established in 1975. A similar program for Morgan Park area was established in 1976. These programs have proved to be successful as is indicated by the following membership trends:

GAGE PARK HIGH SCHOOL
(including Branch membership)

Year	Member-ship	%White	%Black	%Hispanic	%Other
1973	2,680	49.4	42.7	7.4	0.5
1974	2,817	43.4	48.3	8.0	0.3
1975	2,535	40.8	48.6	9.9	0.7
1976	2,229	41.9	46.3	11.3	0.5

MORGAN PARK HIGH SCHOOL
(including Branch membership)

Year	Member-ship	%White	%Black	%Hispanic	%Other
1973	3,221	42.8	55.8	0.9	0.5
1974	3,479	39.6	59.1	0.8	0.5
1975	3,423	36.9	62.3	0.7	0.1
1976	2,911	38.2	61.1	0.5	0.2

FINANCIAL:

It is estimated that transportation costs will range from $45 to $150 per vehicle, per day times 180 days, depending on whether a common carrier or a private contract carrier provides the services. In addition, approximately 33 school aides will be required at $625 per month times 10 months. Cost of transportation based on services of a common carrier is estimated at $267,300 if all 1,652 students opt to transfer.

Accounting classification: 0385-210-000-3741-5510.

Since the School Code prohibits the incurring of any liability unless an appropriation therefor has been previously made, the expenditures set forth above are deemed to be contingent liabilities only, subject to appropriation therefor in the 1977-78 fiscal year budget.

Respectfully submitted,

JOSEPH P. HANNON
General Superintendent of Schools

Noted:
ROBERT STICKLES
Controller

ALFRED L. RUDD
Director, Transportation Services

Prepared by:
THOMAS S. TERAJI
Director, Facilities Planning

Approved:

BESSIE LAWRENCE
Deputy Superintendent — Field Services

MANFORD BYRD, JR.
Deputy Superintendent — Instruction and Pupil Services

JAMES G. MOFFAT
Deputy Superintendent — Management Services

Transcript of Proceedings

before the Honorable HUBERT L. WILL, on August 5, 1977.

PRESENT:

MR. SHALOM L. KOHN
(Sidley & Austin
One First National Plaza
Chicago, Illinois)
on behalf of plaintiffs;

MR. MICHAEL J. MURRAY
(Board of Education
228 N. LaSalle Street
Chicago, Illinois)
on behalf of the defendants.

The Clerk: 76 C 995, Kathy Sue Johnson, et al., versus Board of Education, City of Chicago; 76 C 996, Darrell Milton, et al., versus Board of Education, City of Chicago, report on status.

Mr. Kohn: Shalom Kohn on behalf of the plaintiffs.

Mr. Murray: Michael Murray, for the Board of Education and General Superintendent.

The Court: I have both of your letters, and I guess the Board of Education is going ahead.

Mr. Murray: We are proceeding, yes, your Honor. The Board adopted its action on July 13, and they are proceeding to implement.

The Court: We continued the hearing to see what would happen.

Mr. Kohn: I don't think we have specifically.

Mr. Murray: No. Your Honor was—

The Court: Do the plaintiffs want the hearing reopened and take further evidence?

Mr. Kohn: Well, I think your Honor can rule on the record before him. I think the case should remain pending until subject to some order to see what happens in October, if your Honor is so disposed.

We make certain points about adequate publicity, possible additional alternatives, and even if your Honor is disposed to approve the thrust of the Board's plan, maybe between now and September—

The Court: What are you doing about publicity, because I think that is a reasonable comment.

Mr. Murray: Yes. One of the problems with publicity is, the Board is awaiting the outcome of this cause. How can we publicize something we don't know whether or not is legally acceptable?

The Court: I am not going to do anything with respect to this case. I am not going to dismiss the case. I am not going to enter an injunction. I am not going to do anything.

You are going ahead with this proposal, as I understand it.

Mr. Murray: Yes, your Honor.

The Court: You don't have to wait for me to publicize the proposal. I am not going to enjoin publicity. Maybe I ought to order publicity, but that gives a sort of imprimatur of approval, doesn't it?

Mr. Kohn: I suppose.

The Court: Let me say this.

No doubt in my mind this is progress. How it is going to work out, I want to see.

Mr. Kohn: At some point I suppose the Court will have to make some ruling on this complaint.

The Court: Sure, but if it turns out that it works out reasonably well and that the excluded blacks are going to integrated schools through the vehicle of buses which are being provided, I will probably enter an order saying it is okay.

But, if it turns out that they aren't going because they didn't know of the possibility, or there were some other hitches in the proceedings which in fact foreclosed them, or precluded them from going—now, the number three, designated places not filled from students from one school should be available to students from another school. That seems a sensible proposal.

You ought to coordinate these two things so anybody who wants to go, can go from whatever school he comes from.

Now, its enrollment is less than 105 percent of capacity.

I don't see anything wrong with that. One hundred five of capacity is not such an overloading that you ought to be shying away.

Mr. Kohn: That is the number they used.

The Court: That is your general standard, isn't it?

Mr. Murray: Yes.

The Court: Fair proceedings shall be designed to apportion available spaces among competing students.

I don't know what procedure will be used on that, but I assume you will have to make some decision because some schools will be more popular than others.

Mr. Murray: Yes, I would expect some first come first serve situation.

The Court: Talk to Mr. Morsch and Mr. Kohn about that. See how you come out.

Each receiving school should accept 105 percent of capacity.

Mr. Murray: That the Board of Education feels is educationally necessary.

The Court: I thought that was the general standard.

Mr. Kohn: No, they picked some numbers, and 105 was the maximum limitation on any of them, but some of the schools didn't quite go up to this 105 percent of capacity.

The Court: I see. Kenwood High School, which is only 26 percent white should be added to the list.

I don't think we should do that. I am not going to do that.

Mr. Murray: May I ask if the Court received a certified copy of the Board's action which it adopted?

The Court: Yes. I think this is the certified copy.

Mr. Murray: Yes.

The Court: All right, let us continue it to, what? By October we will know how it is going.

Mr. Kohn: I would think so.

The Court: Let us continue it to the October status, which is October 3.

Mr. Kohn: Would your Honor's minute order include a provision that the Board provide statistics by that date, if it can get them, as to where these kids went?

The Court: Yes. The school will be in operation three weeks then. Get us an order that encompasses all of this, because I agree with you with respect to these other things, and I take it Mr. Murray doesn't disagree.

Mr. Murray: I don't disagree with it, except I would say that even if the plan works perfectly, it will not give the plaintiffs the relief which they seek, and I can't see any good reason for continuing this litigation.

The Court: Mr. Murray, I may dismiss it as moot, or write an opinion as to why I think what has happened is compliance with the constitutional requirements, whatever it may turn out to be. But, I am talking about these things here, adequate provision for publicity, and so forth. I want those in an order today.

You add, Curie School up to 105 percent of capacity. Designated places should be available for students of both schools.

Mr. Murray: I have to object to that. We considered that. We have added, the plan adds 100 students to Curie High School. I think anybody who knows the city at all, and has any—

The Court: What does that make Curie as to capacity?

Mr. Murray: The addition of 100? Excuse me.

Mr. Kohn: As I recall, it would be in a range of about 92, based on last year's statistics. Ninety-two percent, something like that.

The Court: What is the total capacity of Curie?

Mr. Murray: The total capacity at 105 percent, would be 3,775.

The Court: And you are going to have how many there?

Mr. Murray: The membership at Curie on September 30, 1976, was 3,154. This plan would add an additional 100 students.

The Court: You will be at something less than 90 percent of capacity.

Mr. Murray: Yes. We believe that is educationally sound, and any more students added to Curie would be educationally disruptive of the whole program.

The Court: Why?

Mr. Murray: Because a large influx of minority students, that is Marquette Park—

The Court: I know where it is.

Mr. Murray: This is an area where the situation this summer is especially highly volatile.

In our best judgment no more than 100 students should be added to Curie.

Mr. Kohn: One of the things we have been saying in this case is that the choices generally were surrendered to the prejudices of the white students.

We haven't perhaps convinced you of that with respect to Morgan Park or Gage Park, but this evidence of the alternative schools is, I think, at least suggestive that the Board is proceeding under those assumptions.

Mr. Murray: That is hogwash, but even if we had a perfect plan which had no bugs in it, and I am not saying the plan is perfect now, that that wouldn't satisfy the plaintiffs.

The only thing they want to do is get back in their neighborhood schools.

The Court: Your real problem is merely satisfying me.

Mr. Murray: I understand that.

The Court: And leaving Curie at less than 90 percent of the capacity, which is one of the geographically proximate schools to Gage Park and Morgan Park, and sending students 15 miles to schools like Senn, or Roosevelt, or Von Steuben, or Mather, which I guess are even farther than Senn—you know, I understand it is Marquette Park, but I don't think the Board of Education or the federal court ought to be bowing to the prejudices of the people of Marquette Park.

Mr. Murray: We don't either. That is why we have added 100 students to Curie. But, after all—

The Court: What is the racial composition of Curie now?

Mr. Murray: 75-25.

The Court: Which is my recollection. I find it difficult to believe if you add 100, or 200 it is going to make that much difference to the attitude of the students or the school.

Mr. Murray: Your Honor, our first concern of the Board of Education is the academic program at Curie continue.

The Board has taken that into consideration and made a sound judgment, that only 100 students should be added.

The Court: I am not going to tell the Board of Education how many people they should send, but if it turns out they have not done a reasonable job in making available—well, let us see how it works out.

If a lot of these kids go to black schools that would have gone to Curie, I think you may be in trouble with me if you don't let them go to Curie. I will tell you in advance. I am looking for the way it actually works out.

It just seems to me that the Board of Education ought to be doing everything it can to make it work out.

Mr. Murray: I think we are. Let us see how it works out.

The Court: All right, I will see you October 7. We will then do what seems right under the circumstances at that time.

You are going to get me a draft order, but it is not going to include Curie at 105 percent.

Mr. Murray: Right.

The Court: The rest it is, and it is not going to include Kenwood.

Mr. Kohn: That's correct.

The Court: It is going to provide for statistics.

Mr. Kohn: That is right.

The Court: All right. We will see how it works out.

(Which were all the proceedings had in the above-entitled cause.)

Supreme Court, U. S.
FILED
APR 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1356

KATHY SUE JOHNSON, ETC., ET AL., AND
DARCEL MILTON, ETC., ET AL.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MICHAEL J. MURRAY,
228 North LaSalle Street,
Chicago, Illinois 60601,
Attorney for Respondents.

RICHARD E. GIRARD,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1356

KATHY SUE JOHNSON, ETC., ET AL., AND
DARCEL MILTON, ETC., ET AL.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Respondents respectfully submit that the judgment and opinion in this cause of the United States Court of Appeals for the Seventh Circuit correctly stated the law as enunciated in prior decisions of this Court and other lower courts. The judgment and opinion are not in conflict with any decision of any other Court of Appeals and raise no important issue of federal law.

QUESTION PRESENTED.

Whether in view of the findings on the record the Court of Appeals was correct in holding that the stabilization quota plans which were directed toward prevention of *de facto* segregation in schools located in changing neighborhoods and which provided all students residing in the attendance area with a meaningful opportunity to attend an integrated high school were constitutionally permissable.

STATEMENT OF THE CASE.

In addition to using their "Statement of the Case" as a vehicle for argument rather than a true statement of the case, petitioners have been somewhat less than frank and honest in the presentation of facts and argument. They have omitted some of the most pertinent facts on which the trial court and the Court of Appeals relied and pointed out in their various opinions and in their argument petitioners have tried to mislead the Court.

It is necessary, therefore, to present this statement of the case.

The attendance areas for two Chicago public high schools, Morgan Park and Gage Park, were in part undergoing accelerated racial change from white to black in 1975 and 1976 and the two schools were also overcapacity because of increasing enrollment (A 34, finding of fact ¶ 4). Morgan Park High School is at 1744 W. Pryor Avenue (11200 South) and Gage Park is 5600 South Rockwell (2600 West) (A 34, ¶ 1).

During the period from 1972 to 1975 black student enrollment at Morgan Park High School had increased from 52.3% to 62.3% and white student enrollment had declined from

45.7% to 36.9%. Total enrollment had increased from 3092 to 3423. As of January 30, 1976, Morgan Park High School was operating at 128.6% of capacity. (A 34, ¶ 5). During the period 1972 to 1974 black student enrollment at Gage Park had increased from 1056 to 1361 and the school was operating at 106% of capacity (A 35, ¶ 16).

Student racial stabilization quota plans were instituted on May 14, 1975 at Gage Park High School (A 7) and on March 10, 1976 at Morgan Park High School (A 10). A lottery system was used to fill the quotas. The district court's findings of fact stated:

> "These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school. The racial balance at Gage Park High School is 45.4% black, 41.9% white, 12.7% other, and the racial balance at Morgan Park High School is 59% black and 41% white." (A 40, ¶ 26).

Students not admitted to the two schools under the lottery are provided counseling to encourage them to attend other integrated Chicago public high schools with bus transportation provided by the Board from a convenient point in their neighborhood. Over 350 minority students in the 1978-1979 school year alone were taking advantage of the Plans and were bused by the Board to other integrated high schools. (A 14).

The Court of Appeals on the basis of findings on the record stated (A 18):

> "In the case at bar, the Chicago Board of Education voluntarily adopted a desegration plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in

> enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school."

The viable opportunity to attend an integrated high school which the lower courts concluded is being offered to all students living in the Gage Park and Morgan Park attendance areas would not have existed in absence of the stabilization plans, based on the Board's experience throughout the city. (A 21). In contrast to Morgan Park and Gage Park High Schools where "the Plans successfully arrested this trend (toward segregated minority enrollment) . . . (A 18)", enrollment at Fenger, Orr, Bowen, and other Chicago public high schools located in changing neighborhoods in various parts of the city became segregated minority in the absence of such Plans (A 7, 21)*. These three high schools are not isolated examples of the segregative effect that racial change in residential occupancy has had on public high school enrollment in Chicago in the absence of a stabilization plan. They are in dispersed locations in the Southeast (Bowen), Southwest (Fenger) and Northwest (Orr) parts of Chicago. Although Kenwood Academy has remained 26% white for several years with no Plan similar to those at Gage Park and Morgan Park High Schools, it is a unique school located at 5015 South Blackstone Avenue, some distance from Morgan Park or Gage Park High Schools and in the immediate vicinity of the University of Chicago. Gage Park and Morgan Park High Schools are unlike Kenwood as we hereinafter show in Reasons for Denying the Writ.

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* See also Student Racial Surveys (pltfs. exhs. 50, 54) 1970 Survey; Fenger H. S. (page for District 18); Orr H. S. (page for District 25); Bowen H. S. 9 page for District 179; 1975 Survey; Fenger H. S., p. 31; Orr H. S., p. 29; Bowen H. S., p. 21.

The petition makes allegations, refuted by the record, that the Plans "were adopted over the express and determined opposition of the black community" (petn. p. 5), or were "designed to exclude black children from Morgan Park and Gage Park High Schools" or that the plans were ineffective in reversing the decline in white student enrollment (p. 5). Even a general understanding of the facts in this case would show how incorrect such remarks are. First, the record discloses that the "black community" was not opposed to student racial stabilization quota plans. (Transcript, April 29, 1976 at p. 22.) Mrs. Shelby Johnson, who was authorized to speak for the other plaintiffs, stated at the hearing on petitioners' motion for restraining order that she was not opposed to racial stabilization quotas. Although she differed with the quota levels recommended by the Area A Committee after public meetings in the community and adopted by the Board, Mrs. Johnson stated "The Morgan Park Committee have told Mr. Burke (Principal), Mr. Moore (District Supt.), and everyone else that we are not against the 50-50 ratio. . . ." (Transcript, April 29, 1976, at 22).

Secondly, with respect to petitioners' contention that the Plans were intended to exclude only minority students, the Court of Appeals stated (A 22):

> "In this case, there is no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools. On the contrary, it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration *not only at these two high schools but also at alternative high schools designated under the Plans.*" (emphasis added).

Equally important, the Court stated (A 26-27):

> "that when the white enrollment exceeded the established quotas they also would be denied admission. . . . Indeed, the racial quotas established for each high school permitted

> more minority students than white students to enroll, even though the white student population exceeded the non-white student population residing in the attendance areas serving these schools."

Finally, the Court declared with reference to the stabilizing effect of the Plans (A 27):

> "As the district court found, the racial balance at Gage Park is 58.2% nonwhite and 41.9% white, and the racial balance achieved at Morgan Park is 59% nonwhite and 41% white."

Although substantially more white students* than black students reside in the Gage Park and Morgan Park High School attendance areas (A 35, ¶¶ 5, 6), substantially more minority students than whites are permitted to enroll at the two schools under the Plans. With respect to relieving overcrowding and promoting integration in schools situated in rapidly changing neighborhoods, the district court found "the Board has achieved both objectives at each school (A 40, ¶ 26)". The trial court concluded that the voluntary transfer Plans as modified by the busing provision made available to petitioners a meaningful opportunity to attend a Chicago Public high school in an integrated setting and they would suffer irreparable injury if the Plans were abandoned (A 48-49, ¶¶ 5, 7).

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* The decline in white enrollment was attributable at least in part to the fact that white students were enrolling in parochial schools serving the attendance areas for these two schools (A 23). The parochial school system operated by the Chicago Archdiocese is the sixth largest school system in the United States.

REASONS FOR DENYING THE WRIT.

I.

THE STABILIZATION QUOTA PLANS AT GAGE PARK AND MORGAN PARK HIGH SCHOOLS PREVENTED DE FACTO SEGREGATION, PROVIDED A MEANINGFUL OPPORTUNITY FOR ALL STUDENTS TO ATTEND AN INTEGRATED HIGH SCHOOL AND WERE RIGHTLY HELD TO BE CONSTITUTIONALLY PERMISSIBLE BY THE COURT OF APPEALS.

The Court of Appeals held, based on findings on the record, the stabilization quota plans which were directed toward prevention of *de facto* segregation in schools located in changing neighborhoods and which provided all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school were constitutionally permissible (A 25-26). This is not a civil rights action where school authorities are alleged to have engaged in intentional, discriminatory acts. Precisely to the contrary, there is no contention of *de jure* segregation. Petitioners seek to destroy a successful effort to prevent *de facto* segregation in public schools even though

> ". . . it is evident that the Board's voluntary action was motivated by a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration *not only at these two high schools but also at alternative high schools designated under the Plans.*" (A 22.) (Emphasis added.)

Public school authorities have discretionary power in limited circumstances of voluntary affirmative action and in the absence of invidious intent, to implement the kind of remedial plan to prevent *de facto* segregation which the lower courts have upheld in the instant case.

As stated by the Court of Appeals (A 17):

> "In reviewing various integration solutions promulgated by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U.S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 49 (1973); *Wright* v. *Council of City of Emporia,* 407 U.S. 451, 469 (1972)."

This Court has expressly recognized that in taking voluntary steps to alleviate *de facto* segregation there are "broad discretionary powers of school authorities . . ." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 at 16 (1971). In *McDaniel* v. *Barresi,* 402 U. S. 39, 41 (1971), involving the busing of black students to other than their neighborhood schools, this Court declared:

> "In this remedial process, steps will almost invariably require that students be assigned 'differently because of their race'. . . . Any other approach would freeze the status quo that is the very target of all desegregation processes."

Other Federal courts, the Illinois Supreme Court, and courts in other jurisdictions have consistently upheld the authority of school boards to formulate and implement voluntary programs designed to prevent *de facto* segregation. As stated in *Tometz* v. *Board of Education, Waukegan City School District No. 61,* 39 Ill. 2d 593, 237 N. E. 2d 498 (1968):

> "State laws or administrative policies, directed toward the reduction and eventual elimination of *de facto* segregation of children in the schools and racial imbalance, have been approved by every high State court which has considered the issue. . . . Similarly, the Federal Courts which have considered the issue . . . have recognized that voluntary programs of local school authorities designed to alleviate *de facto* segregation and racial imbalance in the schools are not constitutionally forbidden . . . ."

Petitioners erroneously contend in a footnote (petn. p. 17) that voluntary programs to alleviate *de facto* segregation such as the

Gage Park and Morgan Park plans are constitutionally permissible only where each school in the entire city "would reflect the district-wide racial make-up." Contrary to petitioners' contention, this Court has consistently held that there is no constitutional right to a particular degree of racial balance or mixing in the schools. *Swann supra,* at p. 24; *Pasadena Bd. of Education* v. *Spangler,* 427 U. S. 424. An order contemplating the "substantive constitutional right (to a) particular degree of racial balance or mixing" is therefore infirm as a matter of law. *Spangler, supra,* at 434. See also *Milliken* v. *Bradley,* 433 U. S. 267, 53 L. Ed. 2d 745, 756 n. 14 (1977). Based on such authorities the lower courts correctly upheld the Plans without requiring that they provide for a particular racial balance at each public school in Chicago. The Court of Appeals declared:

> "Moreover the absence of a constitutional duty on the part of the school authorities to establishing racially-based enrollments does not preclude the Board from prescribing a racial balance to remedy the segregative impact of demographic change." (A 24-25)

Petitioners' contention that as part of the stabilization quota plans each public school in Chicago must have the same racial balance as the school system as a whole is neither based on holdings of this Court nor realistic. Moreover, contrary to the footnote in the petition (p. 17), Morgan Park and Gage Park High Schools were not 50% white but rather were found by the trial court to be approximately 41% white (A 40, ¶ 26).

Petitioners fail to cite a single decision of this Court or of any other jurisdiction holding that state laws or administrative policies directed to the reduction or prevention of *de facto* segregation in the schools located in changing neighborhoods which provide all students residing there with a meaningful opportunity to attend an integrated school are constitutionally forbidden. Cases cited in the petition (pp. 13, 16-17) involving resistance to a judicial order to desegregate were also cited by petitioners to the Court of Appeals which found them irrelevant

since the stabilization quota plans prevented segregation and were not "intended to retard integration and create racial imbalance at these two high schools." (A 22).

A guaranteed, meaningful opportunity to attend high school in an integrated setting is petitioners' right under the stabilization quota plans. The record is uncontroverted that Gage Park and Morgan Park High Schools have been spared the kind of racial isolation which occurred at Fenger, Bowen, Orr and other high schools where no stabilization quota plans were instituted, and that the right of students, not admitted by lottery, to attend an integrated high school is encouraged and guaranteed by the Board through publicity, student counseling and bus transportation. Petitioners contend (p. 12) that the plans should be abolished since some minority students who are not admitted by the lottery do not avail themselves of the opportunity to attend alternative integrated high schools. However, petitioners omit to say that the pertinent integrative effects of the Plans at Morgan Park, Gage Park and alternative integrated high schools, on which the lower courts relied and pointed out in their decisions would all be lost had the stabilization plans been enjoined. The prevention of segregation and preserving of integration at multiple schools under the Plans is hardly nullified because some choose not to avail themselves of opportunities for attending an integrated high school which is offered and encouraged for all students residing in the attendance areas of the two schools. Thus, the contention that some minority students from the Gage Park or Morgan Park attendance area who refuse to attend any alternative primarily white or integrated high schools located in nearby areas* are made to suffer the "burdens of integration" in violation of the Fourteenth Amendment's equal protection clause is factually and legally in error. Petitioners, just as all students

* The list of these schools now includes five integrated or primarily white south side high schools easily accessible from Gage Park and Morgan Park. Board Report 80-73-2 adopted March 26, 1980, Transfer of Students from Gage Park and Morgan Park High School Attendance Areas.

whether minority or nonminority have no right in federal or state law to attend a particular school. *McDaniel* v. *Barresi,* 402 U. S. 39, 42 (1971); *Allen* v. *Asheville City Board of Education,* 434 F. 2d 902, 905 (4th Cir., 1970) and other cases cited and relied on by the Court of Appeals (A 20).

Since viable alternatives to attend integrated high schools located nearby are guaranteed petitioners and because they have no constitutional right to attend a particular school, the lower courts refused to abolish the Plans. To do otherwise would clear the way for racial segregation at Morgan Park and Gage Park High Schools and substitute a court's judgment for the "broad discretionary powers of school authorities . . ." Such a result would be contrary to the holdings which recognize that "local autonomy of school districts . . ." exists in cases such as this.

Petitioners contend (p. 12) that a technique which would involve "pairing" of Gage Park and Curie High Schools should have been adopted instead of the stabilization quota plans. However, the fact is that Curie High School's attendance area is not a "white enclave" as the petition infers (p. 12). Far from it, Curie is integrated now, having a 40% minority student enrollment (Student Racial Survey, October, 1979).* Pairing would be pointless to achieve integration and certainly wasteful of public funds in the case of two high schools already integrated, such as Gage Park and Curie. Curie had 76% white enrollment in 1976, but the percentage of whites dropped to 73.2% in 1977, 67.2% in 1978 and 60% in 1979. Demographic conditions and trends such as this are ignored in the petition but did not escape that attention of the lower courts. Petitioners' "alternative" proposals such as "pairing" Curie and Gage Park, both integrated high schools, clearly had no sense or merit and the lower court having studied the record rightly concluded that

* The petition refers to matters outside the record, as for example, the second footnote on page 7 of the petition. However, petitioners, were they to be fair, should also consider the public records showing more current statistics on student racial balance in the schools such as Curie High School.

petitioners' alternatives did not "offer a viable means of preventing *de facto* segregation" at Gage Park and Morgan Park High Schools (A 27). Petitioners' contention of "the Court of Appeals' failure to scrutinize . . ." their alternative proposals to the stabilization quota plans at Gage Park and Morgan Park High Schools is totally without support in the record (A 27). Moreover, in spite of declining white enrollment, Curie High School is an alternative school under the Plans and will receive minority students from nearby Gage Park as well as Morgan Park High Schools. In fact, Curie, Kennedy, Hubbard, and Bogan and Washington are all integrated or primarily white south side high schools which are not far from Gage Park or Morgan Park High Schools and which are available as alternative schools under the Plans. Petitioners' allegation (p. 15) of long travel time for students traveling to alternative integrated high schools is simply false. Upon consideration of the facts, many of which are referred to in the Court of Appeals opinion, the Plans are readily seen to be far more "helpful" and less restrictive in preserving integration than any alternative proposal of petitioners' counsel. In reviewing various solutions adopted by local school boards, the Supreme Court has consistently recognized that local autonomy of school districts is a vital national tradition. *Milliken* v. *Bradley,* 418 U. S. 717, 741-742 (1974); *San Antonio School District* v. *Rodriquez,* 411 U. S. 1, 50 (1973); *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 469 (1972).

The record also shows that white students are also affected by stabilization or racial quota plans. The Whitney Young High School, Disney Elementary and Black Elementary magnet schools have racial quota plans and are attended by students from all parts of the city. Many white students have been excluded from Whitney Young High School whenever the number of whites applying has exceeded the quota. It is also true that white students enrolled at Gage Park and Morgan Park High Schools were precluded from transferring to another school

until the quota for white students has been exceeded and that when the white enrollment exceeded the established quotas they would be denied admission (A 26). No "burden of integration" exists where, as here, the voluntary plan which prevents schools from becoming segregated also guarantees each student the meaningful opportunity to attend high school in an integrated setting.

Petitioners state (petn. p. 6) that no Board member testified to the rationale for the stabilization quota plans. However, Mrs. Carey B. Preston, Vice President of the Board of Education and Chairperson of the Area B Committee stated at the committee meeting on May 13, 1975, in recommending the stabilization quota plan for Gage Park High School:

> "I said when we had all the trouble we wanted to keep it as a viable, integrated school. That is my position today, and that was my position then. That is my position today.
>
> "And I will do as I think the other (Board) members of this committe will, we will do whatever we can to try to maintain that. I believe it will ultimately be a better school because of this, because this is just reality." (Dfts. Ex. 35, p. 41; Transcript of public meeting of Board's Area B Committee.)

The statements of Board member Preston at the public meeting on the day that she and other members voted to recommend the Gage Park Plan reflect the intention that the plan was to keep Gage Park High School as a "viable integrated school" Petitioners could have called any Board member as a witness but they choose not to do so. In any case, there was no doubt that the Board's reason for the Plans was to prevent segregation. Moreover, petitioners conceded in their brief in the lower court (p. 26) that the Board, in instituting the Plans, relied on the views of its members, the district superintendents, the high school principals and their staffs, the Board's Director of Facilities Planning and members of local communities. Although no outside demographer testified for either party the

members of the Board, the General Superintendent and his staff had experience within the school system and have witnessed school after school in racially changing neighborhoods become predominantly black because of demographic change. These are the individuals best qualified to assess the circumstances at each school and after public meetings with input from community organizations, leaders, residents and parents to formulate a plan to attempt to stabilize the school population. The Board of Education and the people it relied upon in formulating these Plans have the requisite experience to make the necessary determination regarding the problems at these schools.

Petitioners also contend (petn. p. 6) the Board should not have instituted the stabilization Plans because "Kenwood High School remained constant from 1970-76 at 26% white . . . (and there is) no explanation of why Gage Park and Morgan Park were more like Fenger than Kenwood." However, one of the facts on which the lower courts relied and which was pointed out in the opinion of the Court of Appeals was that "where no stabilization quota plans were instituted, schools *situated in rapidly changing residential neighborhoods* had become racially segregated." (emphasis added) This has been true at Fenger (located immediately to the east of the Morgan Park attendance area), Orr, and Bowen High Schools and at school after school in *racially changing neighborhoods*. It is also true that the Morgan Park and Gage Park High School attendance areas were undergoing in part accelerated racial change at the same time that the two schools were tending toward segregated minority enrollment in 1975 and 1976 when the Plans were established (A 35, ¶ 4; A 40, ¶ 26).

Kenwood Academy is located at 5015 South Blackstone near the University of Chicago and is significantly affected by the University's stabilizing influence. Existing conditions have racially stabilized enrollment at Kenwood which is 12 miles away from Morgan Park and 6 miles away from Gage Park. Kenwood's close proximity to the University of Chicago area,

a community different in many respects from Gage Park or Morgan Park and the fact that enrollment has stabilized at Kenwood makes it very different from Gage Park and Morgan Park where white enrollment was sharply dropping each year and both schools were tending toward becoming segregated minority at the time the stabilization quota plans were instituted. Distance from Kenwood Academy to Morgan Park or Gage Park High Schools was also a reason that Kenwood would not be as logical a choice for comparison purposes as Fenger High School which "adjoins the Morgan Park attendance area on the east. . ." It is readily apparent to all but petitioners why Fenger and other schools referred to in the Court of Appeals opinion were rightly regarded as more comparable to Gage Park and Morgan Park High Schools than Kenwood. Petitioners fail to point out these relevant considerations in their petition for rehearing.

It is clear that if the injunctive relief plaintiffs sought were to have been granted and the quotas abolished, Gage Park and Morgan Park High Schools would have foreseeably and predictably become segregated minority just like Fenger, Orr, Bowen and other high schools. Certainly, past experience in Chicago justified the hopes and expectations of preventing such segregation by the Plans and the record clearly supports their necessity at Gage Park and Morgan Park High Schools. As the district court stated:

> "These plans were attempts on the part of the Board to relieve overcrowding and to promote integration in schools situated in rapidly changing neighborhoods. Experience has shown that the Board has achieved both objectives at each school." (A. 40, ¶ 26)

Also, based on findings on the record the Court of Appeals declared (A 20):

> "The Board's articulated purpose for the adoption of the Plans was the alleviation of overcrowding and the prevention of de facto segregation at Gage Park and Morgan

> Park High Schools. We find the state interest in promoting integration in these two high schools and communities, while at the same time affording all students residing in these attendance areas a viable opportunity to attend high school in an integrated setting, to be compelling."

Abundant evidence in the record supports the district court's findings and the judgment on appeal affirming the racial stabilization quota plans.

Petitioners have also cited no case holding that displacement of the local school authorities by a federal court is warranted where the objective evidence and reasoned legal principles show that the solution formulated by the school board successfully achieved the intended purpose of preventing segregation. The stabilization Plans, therefore, fall well within the permissible scope of local autonomy which this Court has held exists in school districts under circumstances present here. To upset the judgment of the Court of Appeals which affirmed the decree of the district court would reverse sound judicial precedent, set back immeasurably voluntary school desegregation efforts in the circuits across the country, and render communities and schools helpless victims of the segregative effects attendant upon demographic change in a City such as Chicago.

As stated by the Court of Appeals (A 23):

> "The Supreme Court has recognized that 'substantial benefits flow to both whites and blacks from interracial association. . . .' *Linmark Associates, Inc.* v. *Willingboro,* 431 U. S. 85, 94-95 (1977), and those benefits cannot be achieved in the public schols unless a school board may consider steps to resist racial segregation."

II.

THE INTEGRATIVE STABILIZATION QUOTA PLANS DO NOT SUFFER FROM THE FEDERAL LAW INFIRMITY WHICH EXISTED IN THE EXCLUSIONARY ADMISSIONS PROGRAM IN UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE.

The record discloses that the instant case involves voluntary state action directed toward prevention of *de facto* segregation in the public schools through Plans which provide all students residing in the attendance areas with a meaningful opportunity to attend an integrated high school. The facts in this case show that *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978) cited by petitioners (petn. p. 15) is not in point.

The Plans have prevented Gage Park and Morgan Park High Schools from becoming segregated; have stabilized student enrollment in both schools at about 59 percent minority and 41 percent white, and have provided students not admitted to those schools with guaranteed enrollment at equivalent, integrated or primarily white high schools.* Important distinctions exist between the Gage Park and Morgan Park Plan and the admissions program of the University of California Medical School challenged in *Bakke*. Unlike the medical school program, considerations of race or ethnic status do not result in the disenfranchisement of any student in the Chicago public school system. The plans result only in placement of students at various facilities within the system. No one has barred petitioners from an equal educational opportunity unlike Allen Bakke who was totally denied admission to school notwithstanding his "benchmark" score, a cumulative rating consisting of interviewers' summaries, overall and science course grade point averages, MCAT scores, letters of recommendations, extracurricular activities and other

* Over 350 minority students from the Gage Park-Morgan Park areas availed themselves of this opportunity in the 1978-1979 school year alone and were bused by the Board to equivalent high schools furthering integration there (A 14).

biographical data, was higher than those scores of some special candidates admitted to the medical school. Other circuits have distinguished the *Bakke* case from school desegregation cases just as the 7th Circuit has in the case at bar. In *Morrow* v. *Dillard,* 580 F. 2d 1284, 1293 (5th Cir. 1978) the Court stated:

> "The medical school had contended that on several occasions the Court had approved preferential classifications without applying the most exacting scrutiny. Justice Powell emphasized that the cases cited, drawn from the areas of school desegregation, employment discrimination and sex discrimination, were materially different from the facts presented in *Bakke.*

See also *Livingston* v. *Ewing,* 601 F. 2d 1110 (10th Cir. 1979); *Marton* v. *Charlotte-Mecklenburg Bd. of Ed.,* 475 FS 1318, 1345 (W. D. N. C., 1979).

In sum, *Allan Bakke's* strong qualifications, his total exclusion from school and admission of others less qualified to school solely because of race; the fact that enrollment at the medical school was not shifting inexorably to a segregated minority student body as it was at Gage Park and Morgan Park High Schools, are among the salient facts which distinguish *Bakke* from the situation in the case at bar. The absolute exclusion of a strongly qualified applicant from professional school because of race as in *Bakke* was in sharp contrast to the plans which have prevented racial segregation at Morgan Park and Gage Park High Schools and have guaranteed students from those attendance areas a meaningful opportunity to attend Chicago public high schools with primarily white or integrated enrollments. The alternative, integrated high schools are educationally equivalent to either Morgan Park or Gage Park High School and the lower court, familiar with the record, rightly observed that hundreds of minority students are being transported under the Plans to white or integrated high schools. Had there been no Plan at Morgan Park and Gage Park, or

had it been enjoined, those 350 students and all students attending those two schools would be attending schools which would foreseeably and most likely be segregated. "Loss of opportunity" to attend a "neighborhood" high school which would not be integrated but for the stabilization quota plans, cannot begin to compare with total loss suffered by Bakke.

The contention (petn. p. 16) that stabilization quota plans are infirm unless they are adopted specifically to correct a prior finding of a constitutional violation is error since this Court specifically declared that "School authorities . . . might well conclude . . . each school should have a prescribed ratio of Negro to white students . . . within the broad discretionary powers of school authorities." *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 16 (1971). The lower court correctly decided the Plans in the instant case were a proper exercise of the discretionary power of school authorities stating (A 18):

> "In the case at bar, the Chicago Board of Education voluntarily adopted a desegregation Plan designed to prevent *de facto* racial segregation at two public high schools. The record is uncontroverted that prior to the implementation of the Plans, the attendance areas for Gage Park and Morgan Park High Schools were rapidly changing in residential occupancy from white to black and the trend in enrollments was toward segregated student bodies. The district court found, based on a voluminous record, that the Plans successfully arrested this trend and concluded that, as a result of the Board's modification of the Plans, all high school students living in those attendance areas were provided with a meaningful and viable opportunity to attend an integrated high school.
>
> "Accordingly, in view of the broad statutory powers vested in the Board to formulate and to implement educational policy, including the establishment of programs designed to preserve integration in the public schools, we regard the Board's efforts to prevent *de facto* segregation as a legitimate exercise of its discretionary authority consistent with its legislative mandate and established principles of local school autonomy."

See also *Milliken* v. *Bradley*, 418 U. S. 717, 741-742 (1974); *San Antonio Independent School District* v. *Rodriquez*, 411 U. S. 1, 49 (1973); *Wright* v. *Counsel of City of Emporia*, 407 U. S. 451, 469 (1972).

CONCLUSION.

The Court of Appeal's judgment and opinion in this case follows judicial precepts, is in accordance, not in conflict, with prior judicial decisions and correctly applies the law to the relevant facts in the record. For these reasons as well as the reasons contained in the body of this brief, defendants urge that the petition for writ of certiorari be denied.

Respectfully submitted,

BOARD OF EDUCATION OF THE CITY OF CHICAGO, etc., et al.,
Defendants-Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1356

KATHY SUE JOHNSON, ET AL.,
Petitioners,

vs.

BOARD OF EDUCATION
OF THE CITY OF CHICAGO, ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUGGESTION OF MOOTNESS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUGGESTION OF MOOTNESS

Respondent, the Board of Education of the City of Chicago, moves to dismiss the writ of certiorari in this case on the ground that recent developments have rendered it moot or, at the very least, have so changed the focus of the constitutional questions presented as to render them no longer ripe for review. For the reasons explained below, the Board also respectfully requests that this motion be ruled upon prior to the due date for the Board's brief on the merits, which is currently October 15, 1980.

RECENT EVENTS RENDER THIS CASE INAPPROPRIATE FOR ADJUDICATION

Petitioners' challenge is to a pupil assignment plan, in effect at only two of Chicago's 61 general high schools, that

determined admissions by racial quotas. The Board's stated purpose for the quotas was to preserve integration and relieve overcrowding at these two schools. Petitioners complained that the quotas had the effect of excluding only blacks, that the excluded students were not afforded a reasonable opportunity to attend other integrated schools and that the Board had declined to adopt more far-reaching students assignment policies that would have achieved more integration while allocating the attendant "burdens" equitably among racial and ethnic groups.

Petitioners' contentions have been rendered academic by recent and dramatic events. On September 24, 1980, the Board became the first large Northern school district to enter into a consent decree with the United States Department of Justice obligating it to "develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students." (App. 5) The four "Basic Objectives" of the desegregation plan are:

> *"Desegregated Schools.* The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.
>
> *"Compensatory Programs in Schools Remaining Segregated.* In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation, the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.
>
> *"Participation.* To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.
>
> *"Fair Allocation of Burdens.* The plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group." (App. 5)

The decree also establishes a timetable requiring that a detailed plan be adopted by the Board by March 11, 1981 and

that the plan be implemented at the start of the 1981-1982 school year. (App. 11, 17) Finally, the decree ensures compliance with the basic objectives and timetable by providing for continuing jurisdiction and resolution of disputes by the District Court. (App. 4, 11)

In addition to agreeing to this unprecedented decree, the Board has also abolished the admission quotas specifically at issue in this case. On October 1, 1980, the Reverend Kenneth Smith, President of the Board, exercised his authority to discontinue the quota plans at the end of the 1980-1981 school year. (App. 18) Thus, quite apart from the effect of the decree requiring a system-wide desegregation plan for the next school year, this case has been mooted by action identical to that sought by petitioners—abolition of the admissions quotas.

THIS CASE SHOULD BE DISMISSED AS MOOT OR, IN THE ALTERNATIVE, NO LONGER RIPE

When the petition for certiorari was granted in this case, a ripe controversy existed concerning the constitutionality of the admissions quotas for the two schools in question, Gage Park and Morgan Park high schools. While the Board maintained that these quotas constituted a permissible exercise of discretion to relieve overcrowding and preserve integration at schools undergoing racial change, petitioners alleged that they placed the entire burden on blacks and that the Board's failure to adopt more far-reaching programs undermined its claimed benign purpose. The controversy is now moot, for the quotas themselves have been terminated. Moreover, even if some vestige of an Article III "case or controversy" remains, the Board's judicially-enforceable commitment to implement a system-wide desegregation plan so alters the focus of the constitutional issues that the case is no longer ripe for review.

Because petitioners have received all they demanded,* the former dispute between the parties has ceased to be "definite and concrete" and no longer "touch[es] the legal relations of

* Petitioners sought injunctive relief only, not damages.

parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937); *DeFunis* v. *Odergaard*, 416 U.S. 312, 317 (1974). Dismissal is therefore required under the familiar rule that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). In this case, the mootness doctrine furthers the general policy of avoiding constitutional pronouncements that are not absolutely necessary. *See Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936). The doctrine is not merely one of prudence, however, for a federal court's inability "to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends on the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964); *see also Powell* v. *McCormack*, 395 U.S. 486, 496 n.7 (1969); *Sibron* v. *New York*, 392 U.S. 40, 50 n.8 (1968).

Nor can petitioners save this case from mootness by arguing that the abolition of the quotas is a voluntary cessation of illegal conduct. It is well-settled that voluntary cessation of allegedly illegal conduct does in fact moot a controversy if "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Here, the Board is bound by judicial decree to implement a system-wide desegregation plan next Fall, and therefore it is precluded from reinstituting an admissions policy under which quotas are employed only at Gage Park and Morgan Park. Consequently, it cannot be said in this case that "[t]he defendant is free to return to his old ways." *Id.* at 632; *see also Preiser* v. *Newkirk*, 422 U.S. 395, 402-03 (1975).

Indeed, even if the quotas had not been discontinued, the consent decree itself would render this case inappropriate for adjudication, for the quotas would be administered in the entirely new context of a system-wide desegregation plan. Petitioners have emphatically stated that, within this

broader context, they would have no complaint if some black students were excluded from Gage Park and Morgan Park:

> "At the outset, it is important to note what this case does *not* involve.
>
> "Petitioners do not contend that school children have an absolute right to attend a neighborhood school. Nor do they urge that a school board which treats the races equitably may not take race into account in school assignments as part of an effort to desegregate its school system." (Petitioners' Brief 11, emphasis in original).

Indeed, petitioners conceded that, if quotas were part of a "system-wide desegretation effort [which] distributes burdens equitably between the races," there would be "no equal protection violation" and therefore "no basis for invalidating a desegregation program." (*Id.* at 15 n.*.)

Because the Board is legally required to institute just such a "system-wide desegregation effort," the constitutional issues raised by petitioners are no longer in their original focus and therefore no longer ripe for review. *See generally Rescue Army* v. *Municipal Court,* 331 U.S. 549 (1947). The constitutionality of admissions quotas for particular schools will be largely determined by the overall shape taken by the system-wide plan over the next several months. This Court routinely abstains from deciding issues of federal law that may be "avoid[ed] or significantly modif[ied]" by a State court's impending resolution of statutory ambiguities. *Lake Carriers' Ass'n* v. *MacMullen,* 406 U.S. 498, 512 (1972). The same ripeness considerations counsel dismissal here, for the broad issues raised by petitioners will be avoided or significantly modified when the system-wide plan is developed this Spring and implemented next Fall. As this Court observed in *Sanks* v. *Georgia,* 401 U.S. 144, 152 (1971):

> "The focus of this lawsuit has been completely blurred, if not altogether obliterated, and our judgment on the important issues involved is potentially immaterial. Indeed, the instant case is obviously more compelling than [*United States* v. *Fruehauf,* 365 U.S. 146 (1961)],

since this one presents an issue of constitutional, not statutory, interpretation."

Finally, the Board respectfully suggests that further litigation of the instant case would hinder rather than advance its efforts to implement a system-wide desegregation plan with minimum acrimony. In its September 24, 1980 Resolution approving entry of the consent decree, the Board noted "that litigation over desegregation liability issues would be protracted, divisive in the community rather than healing, and wasteful of resources that can better be devoted to achieving the educational goals of the school system." (App. 1) Argument on the merits of this case could involve just such divisiveness at a time when the Board has undertaken the delicate task of moving ahead with desegregation without regard to the legality or illegality of the conduct of its predecessors. Because the Board seeks to avoid assuming an adversary's posture on these matters, it respectfully requests this Court to rule on the instant motion prior to the due date for its brief on the merits, which is presently October 15, 1980.

CONCLUSION

For the foregoing reasons, the Board moves that the writ of certiorari be dismissed.

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ROBERT J. BATES, JR.

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October 2, 1980

APPENDIX

RESOLUTION PROVIDING FOR EXECUTION AND FILING OF CONSENT DECREE

WHEREAS, the Board of Education of the City of Chicago (the "Board") believes that racial isolation is educationally disadvantageous to all students, and that educational benefits will accrue to all students through the greatest practicable reduction in the racial isolation of students; and

WHEREAS, the Board believes that, in consultation with experts, staff and the citizens of the City of Chicago, plans and procedures for the reduction of racial isolation should be developed and implemented by the Board because of the Board's familiarity with and sensitivity to the unique situation presented in Chicago and the Board's ability to design a solution that best meets the needs of the Chicago school system; and

WHEREAS, the Board also believes that a creative approach to the desegregation of the school system—not only physically but in terms of curriculum, program and attitude—can provide a unique opportunity to achieve educational equity and to increase educational quality in the school system; and

WHEREAS, on April 21, 1980, the Department of Justice informed the Board of its conclusion that the Board is guilty of unlawful segregation of students on the basis of race and that it is prepared to file suit against the Board unless voluntary compliance to remedy the alleged violations of law can be assured; but invited the Board to enter into negotiations aimed at reaching an agreement that would resolve the matter; and

WHEREAS, the Board further believes that litigation over desegregation liability issues would be protracted, divisive in the community rather than healing, and wasteful of resources that can better be devoted to achieving the educational goals of the school system; and

WHEREAS, the Board of Education of the City of Chicago has reviewed and considered the Consent Decree attached hereto and has determined, for the reasons set forth above

and in the Consent Decree, the entry of the Consent Decree by the United States District Court for the Northern District of Illinois would be in the best interests of the students served by the Board of Education, now therefore

BE IT RESOLVED, by the Board of Education of the City of Chicago as follows:

That, following the filing of a Complaint by the United States, Counsel for the Board is authorized and directed to execute the Consent Decree (attached hereto as Exhibit "A") on behalf of the Board and to seek judicial approval and entry of the Consent Decree.

That the Committee on Student Desegregation is authorized to direct and monitor the implementation and compliance by the Board with the Consent Decree and to report periodically to the Board on the status of such implementation and compliance.

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* vs. BOARD OF EDUCATION OF THE CITY OF CHICAGO, *Defendant.*	No. 80 C 5124

CONSENT DECREE

1. The United States has filed a complaint alleging that the Board of Education of the City of Chicago (the "Board") has engaged in acts of discrimination in the assignment of students and otherwise, in violation of federal law. The United States alleges further that such acts have had a continuing system-wide effect of segregating students on a racial and ethnic basis in the Chicago public school system.

2. In addition, the United States Department of Health, Education and Welfare ("HEW") in 1979 and in 1980 found the Board ineligible for funding under the Emergency School Aid Act on the basis of its determinations that the Chicago public school system is characterized by racially segregated and over-crowded schools. Following a presentation of facts by the Board in defense of its actions, these HEW determinations were reaffirmed by the Department of Education on June 12, 1980.

3. The Board neither admits nor denies the allegations of the complaint in this action. It recognizes, however, that the Chicago public school system is characterized by substantial racial isolation of students.

4. The Board believes that racial isolation is educationally disadvantageous to all students and that educational benefits will accrue to all students through the greatest practicable reduction in the racial isolation of students.

5. The Board believes that litigation of this action would require a substantial expenditure of public funds and a substantial commitment of Board and staff time and resources, at a time when financial and personnel resources are already greatly limited, and that such resources can more appropriately be used to achieve the educational goals of the school system. The parties further believe that litigation of this action would be protracted and that settlement of the action is in the public interest.

6. In light of these considerations, the parties, as indicated by the signatures of their counsel below, have determined to settle this action and resolve the United States' request for injunctive relief by entry of this consent decree. The parties submit to the jurisdiction of the Court and acknowledge that subject matter jurisdiction exists over this action under the Fourteenth Amendment of the United States Constitution; under Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c and 2000d; and under 28 U.S.C. Sec.1345. The Board waives the notice provisions of those acts. Both parties waive the entry of findings of fact and conclusions of law. Each party shall bear its own costs.

7. Both parties agree that this Consent Decree is final and binding as to the issues resolved herein. The Court shall retain jurisdiction of this action for all purposes, until a final order is entered terminating this litigation.

8. In the event that objections or challenges are raised (e.g., through intervention or separate collateral lawsuits) to the lawfulness or appropriateness of (a) this decree, any provision hereof, or proceedings pursuant hereto, or (b) any aspect of the desegregation plan provided for in Part I hereof after approval of the plan by the Department of Justice or by the Court, the Board and the Department of Justice shall defend the lawfulness and appropriateness of the matter challenged. If any such collateral lawsuit arises in state

court, the parties shall seek to remove such action to the U.S. District Court.

WHEREFORE, the parties having freely given their consent, the terms of the Decree being within the scope of the complaint, and the terms of the Decree being fair, reasonable and adequate, it is hereby ORDERED, ADJUDGED, and DECREED that:

I. STUDENT DESEGREGATION

1. *Systemwide Remedy.* The Chicago Board of Education (the "Board") will develop and implement a system-wide plan to remedy the present effects of past segregation of Black and Hispanic students.

2. *Basic Objectives.*

   2.1 *Desegregated Schools.* The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago.

   2.2 *Compensatory Programs in Schools Remaining Segregated.* In order to assure participation by all students in a system-wide remedy and to alleviate the effects of both past and ongoing segregation, the plan shall provide educational and related programs for any Black or Hispanic schools remaining segregated.

   2.3 *Participation.* To the greatest extent practicable, the plan will provide for desegregation of all racial and ethnic groups, and in all age and grade levels above kindergarten.

   2.4 *Fair Allocation of Burdens.* The plan shall ensure that the burdens of desegregation are not imposed arbitrarily on any racial or ethnic group.

3. *Board Discretion in Plan Development.*

   3.1 *Board Discretion in Selecting from Alternatives.* The Department of Justice recognizes that there is a broad range of constitutionally acceptable plans

that will fulfill the basic objectives stated in Part 2. The Department of Justice further recognizes the Board's familiarity with and sensitivity to the unique situation presented in Chicago, and the authority of the Board, in its discretion, to select from within the constitutional range the plan that best meets the needs of the Chicago School District.

3.2 *Racial/Ethnic Balance of Specific Ratios Not Required.* The parties recognize that courts have not required specific racial ratios in schools as a necessary remedy in desegregation cases, that racial and ethnic balance throughout the Chicago School District is neither practicable nor required, and that no particular definition of a desegregated school is required.

4. *Techniques.* In establishing desegregated schools, the Board may use the following techniques, among others:

4.1 *Voluntary Techniques.*

4.1.1 Permissive transfers that enhance desegregation, with transportation at Board expense.

4.1.2 Magnet schools that enhance desegregation.

4.1.3 Voluntary pairing and clustering of schools.

4.1.4 If magnet schools or other voluntary techniques are used, each shall contain racial/ethnic goals and management controls (e.g., an alternative that would require mandatory re-assignments) to ensure that the goals are met.

4.2 *Mandatory Techniques Not Involving Transportation.*

4.2.1 Redrawing attendance areas.

4.2.2 Adjusting feeder patterns.

4.2.3 Reorganization of grade structures, including creation of middle schools.

4.2.4 Pairing and clustering of schools.

4.2.5 Selecting sites for new schools and selecting schools for closing to enhance integration.

4.3 *Mandatory Reassignment and Transportation.* Mandatory reassignment and transportation, at Board expense, will be included to ensure success of the plan to the extent that other techniques are insufficient to meet the objective states in Sec. 2.1. The plan may limit the time or distance of mandatory transportation to ensure that no student shall be transported for a time or distance that would create a health risk or impinge on the educational process. These limitations may vary among different age and grade levels.

4.4 *Priority and Combination of Techniques.* The plan may rely upon the techniques listed above and any other remedial methods in any combination that accomplishes the objective stated in Sec. 2.1.

5. *Exceptions.*

5.1 *Justification for Remaining Identifiable Minority Schools.* With respect to any schools that remain identifiable as Black or Hispanic schools, the plan shall provide specific justification in terms of practicability (i.e., educational or practical considerations), in the context of the extent to which the plan as a whole achieves the objectives stated in Part 2.

5.2 *Stably Integrated Schools.* The plan may create exceptions with respect to individual schools which it shows are already stably integrated (or will become stably integrated by the time of implementation of the plan.)

5.2.1 *Initial Exception.* The plan may exclude such schools from reassignment of students if the extent of integration is within a reasonable range of that to be achieved in the schools referred to in Sec. 2.1.

5.2.2 *Subsequent Exception.* The plan may provide for the later exclusion from student reassignment of any initially included school that, through demographic changes or other factors, promises to become stably integrated.

5.2.3 *Subsequent Inclusion.* The plan should include sufficient flexibility to enable any of the techniques outlined above to be applied to any school in which stability of integration is threatened by unforeseen circumstances.

6. *Bilingual Education.* The Board's legal obligations to provide bilingual education for non- and limited-English speaking students shall be discharged in a manner consistent with the overall objectives of the plan. To the extent that students who require bilingual education are reassigned, they shall not be reassigned in a manner that interferes with their participation in bilingual programs.

7. *Compensatory Programs in Schools Remaining Segregated.* To accomplish the objective stated in Sec. 2.2, the plan will include specific programs for Black or Hispanic schools remaining segregated, in the following areas among others:

7.1 Remedial and compensatory educational programs.

7.2 Improved curricula and instructional and evaluative techniques (including the utilization of tests that validly measure student achievement) for academic, vocational and alternative educational studies.

7.3 Pre-service and in-service instruction for administrators, principals, teachers and other school personnel.

7.4 Selection, and evaluation of the performance of, principals and supporting leadership staff.

7.5 Testing, counseling, guidance and student welfare.

7.6 Physical facilities, safety and security.

7.7 Supportive relationships between such schools and groups and institutions in the community and in government.

8. *Overcrowding.* The Board is encouraged but not required to eliminate overcrowded schools. The plan should provide, to the greatest extent practicable considering all the circumstances, for the elimination of racially disproportionate overcrowding of classrooms and school sites.

9. *Discipline.* The plan shall include provisions to ensure that discipline is administered in a non-discriminatory manner.

10. *Resegregation.* The plan shall contain provisions to ensure against resegregation of students after implementation, in the following areas:

10.1 *In-School.* The plan shall include provisions to ensure that students attending desegregated schools are not resegregated within their schools without adequate educational justification. This provision shall apply to the assignment of students to classrooms as well as to programs of instruction.

10.2 *Student Reassignment.* The plan shall include provisions to ensure that students shall not be reassigned in a manner that, considering the district as a whole, causes the resegregation of schools.

10.3 *Structural Adjustments.* The plan shall include provisions to ensure that site selections, construction, school closings, readjustments of attendance areas and feeder patterns, and new placement of mobile classrooms shall be accomplished so as not to cause the resegregation of schools.

10.4 *Educational Program Adjustments.* The plan shall include provisions for utilization in desegregated schools of such of the specific programs referred to in Part 7 hereof as the Board concludes are necessary to ensure against resegregation of such schools.

11. *Facilitating Success of the Desegregation Process.*

    11.1 *Community Involvement.* The plan will establish programs to promote public involvement with and support for the desegregation process.

    11.2 *School Personnel.* The plan will provide for pre-service and in-service training programs for Board personnel such as administrators, teachers, auxiliary staff, bus drivers and monitors.

    11.3 *Other Institutions.* The Board shall endeavor to involve in the desegregation process state and local government, private businesses, colleges and universities, civic and community organizations, labor unions, professional organizations, religious and cultural institutions, the parochial school system and other private schools.

12. *Voluntary Interdistrict Pupil Transfers.* The plan will include provisions, including without limitation the payment of transportation costs, to encourage and facilitate voluntary interdistrict pupil transfers having integrative effects between schools in the Chicago School District and schools in other districts in the Chicago Standard Metropolitan Statistical Area ("SMSA").

13. *Reporting.* The plan shall establish a system of record-keeping and reporting through which the Board's compliance with the provisions of this agreement can be monitored.

14. *Flexibility.* The parties to this agreement recognize that neither the principles set forth above nor the desegregation plan can provide for every contingency and that exceptions will be necessary. The burden is on the Board, however, to justify such exceptions on the basis of educational and practical considerations.

15. *Financial Cost of the Plan.*

15.1 Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

15.2 Each party reserves the right to seek to add additional parties who may be legally obligated to contribute to the cost of the desegregation plan.

15.3 The parties recognize that financial cost of implementation does not excuse the failure to develop a desegregation plan consistent with the principles set forth in Sections 2-14, and is not a basis for postponement, cancellation or curtailment of implementation of the plan after it has been finally adopted, but is one legitimate consideration of practicability in meeting the objective stated in Sec. 2.1.

16. *Time table.* The plan will be developed in accordance with the schedule set forth in Attachment A and will be implemented beginning with the 1981-82 school year.

17. *Public Participation.* The Board will receive and consider comments and recommendations from all persons and groups during the development of the desegregation plan.

18. *Resolution of Disagreements.* If the parties to this decree are unable to agree as to whether the desegregation plan is consistent with the principles set forth above in Sections 2 through 15, the disagreement will be submitted to the court for resolution.

II. ADDITIONAL PROGRAMS AND PARTIES

1. *Interagency Coordination.* The Department of Justice agrees that it will, pursuant to the Attorney General's authority (including that under Executive Order 11764 to coordinate the enforcement of Title VI of the Civil Rights Act of 1964), initiate and carry forward discussions with other agencies of the federal government to bring about a coordinated affirmative administration of federal grant programs in the Chicago SMSA with the

goal of contributing to the creation and maintenance of stably integrated schools in the Chicago SMSA. These federal programs include, for example, housing, employment and transportation in addition to education.

2. *State Responsibility.*

2.1 The Department of Justice will thoroughly pursue and promptly complete its investigation of whether the State of Illinois should be made a party defendant and be required to assist and support, financially and otherwise, the implementation of the desegregation plan discussed in Part I. The investigation will examine whether the State and/or its agencies have contributed, through action and inaction, to the segregation of, or other discrimination against, students in the Chicago School District.

2.2 Upon completion of the investigation the Department will submit the factual findings thereof to the Court and, if warranted by the results of the investigation, promptly take such enforement action as is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

3. *Interdistrict Remedies.*

3.1 The Department of Justice will thoroughly pursue and promptly complete its examination of the extent to which interdistrict remedies for segregative conditions in schools in the Chicago school district may be appropriate, including (without limitation) by reason of the possibilities that:

3.1.1 The State of Illinois together with school districts in the Chicago SMSA, or some of them, may have acted in effect as a metropolitan school district with respect to vocational, special and other educational programs; and

3.1.2 The State of Illinois together with State housing agencies and other agencies of state government, including units of local government in the Chicago SMSA, or some of them, may have contributed to the segregation of the races in the Chicago SMSA by racially discriminatory use of state or federal housing laws or programs, or of state or local land use control laws.

3.2 Upon completion of the investigation, the Department will submit the factual findings thereof to the Court and will take whatever enforcement action is appropriate under the circumstances, consistent with the Attorney General's responsibilities under Title IV of the Civil Rights Act of 1964.

4. *LEAA Grant Condition.* The Department of Justice agrees that the entry of this consent decree is a sufficient basis for the removal, from the grant awarded by the Law Enforcement Assistance Administration to the Board on September 10, 1980, (¶80-JS-AX-0043), of the condition relating to Title VI of the 1964 Civil Rights Act and Sec. 815 of the Criminal Justice Improvement Act of 1979.

III. OTHER ISSUES

1. *Classroom Segregation.* The Board will promptly implement a plan to ensure that no student is assigned to a racially/ethnically isolated or identifiable classroom except when the assignment is justified educationally. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under the Emergency School Aid Act ("ESAA") for fiscal year 1979, which was found acceptable by the Department of Health, Education and Welfare ("HEW") and is presently acceptable to the Department of Education.

2. *Bilingual Programs.* The Board will promptly implement a plan to ensure that non- and limited English speaking students are provided with the instructional

services necessary to assure their effective participation in the educational programs of the Chicago School District. The plan will be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

3. *Faculty Assignment.* The Board will promptly implement a plan to assure that he assignment of full-time classroom teachers to schools will be made in such a manner that no school is identified as intended for students of a particular race, color or national origin. Except as specifically provided herein, the plan shall be consistent with the Board's application for a waiver of ineligibility for funding under ESAA for fiscal year 1979, which was found acceptable by HEW and is presently acceptable to the Department of Education.

   3.1 Not later than November 1, 1981, with respect to the full-time classroom teachers in each school faculty, the racial/ethnic composition and the proportion of experienced teachers will be between plus and minus fifteen percent of the system-wide proportions of such teachers with respect to such characteristics, and the range of educational training will be substantially the same as exists in the system as a whole.

   3.2 The Board will make every good faith effort to follow professional staff assignment and transfer practices which, when taken together as a whole on a frequently reviewed periodic basis, will assure that the racial composition, the experience and the educational background of individual school faculties and administrative staff more nearly approach* the city-wide proportions of minority, experienced, and more extensively trained professional staff; provided however, that nothing in this plan shall

* Plus or minus ten percentage points of city-wide averages for race, experience and training for each type of school facility.

require the assignment or transfer of any person to a position for which he or she is not professionally qualified. The Board will not adopt or follow assignment and transfer practices which will foreseeably result in the racial identifiability of schools based on faculty or administrative staff composition or in unequal distribution of experienced and more extensively trained staff.

3.3 The failure of a particular school or schools to meet the guidelines will not constitute noncompliance with the above guidelines if the district provides a detailed satisfactory explanation justifying such failure to meet the guidelines.

September 24, 1980
Date

ENTER:

s/ MILTON I. SHADUR
UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED CONSENT TO THE ENTRY OF THIS DECREE:

s/ DREW S. DAYS III
DREW S. DAYS III
Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530
202/633-2151

Attorney for the United States of America

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312/353-5300

Attorneys for the Board of Education of the City of Chicago

ATTACHMENT A

TIMETABLE FOR PLAN DEVELOPMENT

The following timetable will be followed by the Board pursuant to Part I, Sec. 16, except as modified by agreement between the Board and the Department of Justice or as extended by leave of Court:

October 15, 1980	Appointment of principal plan development consultant(s)
November 17, 1980	Progress report to Justice Department
December 4, 1980	Identification of plan components appropriate for funding in the basic and magnet categories under the Emergency School Aid Act and submission of appropriate funding proposals to the Department of Education
December 15, 1980	Progress report to Justice Department
January 15, 1981	Progress report to Justice Department
February 16, 1981	Progress report to Justice Department
	Prior to adoption of a plan by the Board, the Board will publish the proposed plan and hold public hearings thereon.
March 11, 1981	Completion of final plan and adoption of plan by the Board. The plan will be conveyed to the Justice Department and filed with the Court.

BOARD OF EDUCATION
CITY OF CHICAGO
228 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
TELEPHONE 641-3800

KENNETH B. SMITH
PRESIDENT

October 1, 1980

To the Members of the
Board of Education:

Pursuant to my authority under Sec. 2-4, Rules—Board of Education of the City of Chicago, to act between meetings of the Board, this will confirm that the Student Racial Stabilization Quota Plan in effect for the past several years at Gage Park and Morgan Park High Schools is hereby discontinued, effective at the close of 1980-81 school year. This action was taken based upon the consent decree in *United States* v. *Board of Education of the City of Chicago,* unanimously approved at the regular meeting of the Board on September 24, 1980, which provides for a systemwide student desegregation plan.

I further wish to advise you of the results of the telephone poll conducted by my Office on September 30, 1980. Eight (8) Members of the Board approved such action. The remaining three (3) Members were out of the City and could not be reached.

Sincerely,

s/ KENNETH B. SMITH

Kenneth B. Smith
President

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No. 79-1356

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

KATHY SUE JOHNSON, etc. et al., and
DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

OPPOSITION TO SUGGESTION OF MOOTNESS

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October 10, 1980

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5 Wright & Miller, Federal Practice & Procedure, §1255, at 250-54 . . . 3

No. 79-1356

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

OPPOSITION TO SUGGESTION OF MOOTNESS

INTRODUCTION

Petitioners strongly oppose the suggestion of mootness advanced by respondent Board of Education.

This case involves the lawfulness of racial quota plans adopted by respondents at two of 61 of Chicago's

general high schools. The Board now contends that this case is moot because it has decided to abandon the quota plan as of the end of the 1981 school year, over seven months from now.

ARGUMENT

THIS CASE IS NOT MOOT

For several reasons, this case is not rendered moot by the Board's claim that it will voluntarily cease its unlawful conduct.

First, it is noteworthy that the quotas are not to be abandoned until the close of the school year. There is no reason that this case cannot be fully briefed, argued and adjudicated in the next seven months, so that the challenged quotas will be in effect at the time of decision and subject to injunctive relief. Thus, irrespective of whether the case may be moot in the next school year, it is not moot at this time.

Even more important, the Board's professed intention to abandon the quotas in the future does not moot the claims of individual petitioners, who have been unlawfully excluded from Gage Park and Morgan Park High Schools in the past. No provision has been made by the Board for the

readmission of the thousands of black students, including petitioners, excluded from those schools. Rather, under the terms of the quota plan, excluded children relegated to alternative schools "are to be considered members of that [alternative] school's regular student body and, therefore, are not unilaterally transferable." (J.A. 26).

Thus, if the quota plans are declared unlawful, petitioners and others similarly situated will be entitled to readmission to Gage Park and Morgan Park High Schools. Cf. University of California Regents v. Bakke, 438 U.S. 265 (1978)(student excluded by unlawful quota entitled to readmission to school). This relief is not being afforded by the Board. Plainly, petitioners have a continuing concrete interest in the controversy because it is only through this litigation that they can be readmitted to their neighborhood schools.

In addition, petitioners have a continuing claim for money damages if their exclusion on account of race was unlawful. Contrary to respondent's statement (br. at 3n.) that petitioners sought injunctive relief only, the Complaint included a prayer for "such other and further relief...as the Court may deem just and proper," (R.1 at 11), a phrase intended to include a prayer for damages. Such a prayer is

sufficient under the Federal Rules of Civil Procedure to support a claim for monetary relief, see 5 Wright & Miller, Federal Practice & Procedure §1255, at 250-54. This Court's decision as to the lawfulness of the Board's revised quota plans (which provided excluded children with bus transportation to alternative schools) will be determinative as to petitioners' entitlement to damages. The existence of this damage remedy precludes any claim of mootness. E.g, Powell v. McCormack, 395 U.S. 486, 499-500 (1969); Bond v. Floyd, 385 U.S. 116, 128 n.4 (1966). In the same vein, petitioners' ability to obtain an award of attorneys fees if their position is vindicated prevents any mootness which might otherwise exist. See Deposit Guarantee National Bank v. Roper, 48 U.S.L.W. 4279 (S.Ct., March 19, 1980)(offer of judgment to class representative does not make case moot where the representative would have a claim against other class members for attorneys fees and costs).

Even apart from these considerations, this case is not moot because the Board is "free to return to [its] old ways." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). The very vague provisions in the Consent Decree provide no assurance that petitioners will not again be the victims of unlawful discrimination. The Decree, for example, has no definition of "desegregation" (§2.1), no criteria for what is "practicable" (§§2.1, 2.3), and no definition of

under what circumstances a burden on one racial group is deemed to have been imposed "arbitrarily." (§2.4). The Consent Decree allows, but does not mandate, the Board to adopt mandatory reassignment measures (§4). It also provides that "stably integrated schools"--which are not defined--can be excluded from the desegregation plan. (§5.2).

Thus, nothing in the Consent Order precludes the Board from implementing the precise situation now present--that petitioners are the only children in Chicago forcibly excluded from their neighborhood schools on account of their race. And this danger is particularly severe because the imposition of burdens exclusively on blacks through quotas has been already upheld by the Court of Appeals for the Circuit in which the Consent Decree has been entered. In fact, the other party to the Consent Decree -- the Department of Justice -- has already concluded that the Decree does not preclude the racial quotas imposed by the Board. See Letter of Solicitor General to this Court, September 30, 1980 (Consent Decree does not moot this litigation). Particularly given the history of this litigation, Chicago's pattern of general resistance to desegregation efforts, and the vagueness of the Consent Decree, the Board has not met the stringent test that there be "no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant Co., supra, 345 U.S. at 633:

> "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. But here we have only [respondent's] own statement.... Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests in [respondent's] shoes."

United States v. Phosphate Export Ass'n, 393 U.S. 199, 203 (1968).

Nor is there any substance in respondent's claim that this case is not "ripe for review" because the Board is planning to implement a "desegregation" plan in September, 1981. This is not a case where there is any ambiguity in a challenged statute which requires clarification in order to present this Court with a concrete and definitive controversy. Rescue Army v. Municipal Court, 331 U.S. 549, 575-78 (1947). The deference to state procedures urged by respondent should "only be made where the issue of state law is uncertain" -- and not otherwise. Harman v. Forssenius, 380 U.S. 528, 534-35 (1968), quoted in Lake Carriers' Ass'n v. MacMullen, 406 U.S. 498, 511 (1972). There is nothing in the Consent Decree, however, which creates any uncertainty as to the Board's past treatment of petitioners or the relief which petitioners are still seeking -- readmission to the schools, damages, and attorneys fees. Plainly, "[t]here is still a dispute, which is not 'blurred' or 'obliterated,' on which a

judgment will not be immaterial." Bell v. Wolfish, 441 U.S. 520, 550 n.31 (1979), distinguishing Sanks v. Georgia, 401 U.S. 144 (1971).

CONCLUSION

For all these reasons, respondent's Suggestion of Mootness should be rejected and this case should proceed on the merits.

Respectfully submitted,

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No. 79-1356

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

Kathy Sue Johnson, etc. et al. and
Darcel Milton, etc. et al.,

Petitioners,

v.

Board of Education of the City of Chicago,
et al.

Respondents.

On Writ of Certiorari To The United States
Court of Appeal For The Seventh Circuit

PROOF OF SERVICE

Pursuant to Rules 28 and 33 of the United States Supreme Court, I hereby certify that I served the requisite copies of the Opposition to Suggestion of Mootness on all the parties hereto by causing them to be delivered by mail to Thomas F. Gardner, Kirkland & Ellis, 200 East Randolph Drive, Chicago, Illinois this 10th day of October, 1980.

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SHALOM L. KOHN

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Supreme Court, U. S.
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No. 79-1356

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

KATHY SUE JOHNSON, et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

REPLY MEMORANDUM IN SUPPORT OF SUGGESTION OF MOOTNESS

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No. 79-1356

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

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BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

REPLY MEMORANDUM IN SUPPORT OF
SUGGESTION OF MOOTNESS

Petitioners' response to the Board of Education's Suggestion of Mootness fails to rebut the Board's showing that this dispute has ceased to exist.

Petitioners first assert that the Board's abolition of the quota plans effective at the end of this school year does not moot the case because it might be fully briefed, argued, decided and "subject to injunctive relief" within the next seven months. However, this case involves pupil assignments, with all their accompanying administrative and logistic

difficulties. In such cases, reassignments are routinely commenced not in the middle of a semester, but at the beginning of the coming semester. Thus, even if petitioners' ambitious timetable were met and a decision favorable to petitioners were rendered early in calendar year 1981, relief would not be effective until the next semester -- the Fall of 1981. In the interim, the quota plans will have terminated pursuant to the Board's recent decision.

Petitioners next contend that the abolition of the quota plans does not affect an individual student's asserted right to be reassigned to one of the two schools in question because, "under the terms of the quota plan, excluded children relegated to alternative schools 'are to be considered members of that [alternative] school's regular student body and, therefore, are not unilaterally transferable.'" (Opposition, p. 3; emphasis added) In fact, the "terms of the quota plan", including those concerning reassignments, cease to be effective when the quota plan itself terminates. More importantly, even if the plans at issue had not been abolished, a victory for petitioners would not mean "that they can be readmitted to their neighborhood schools." (Opposition, p. 3) All student assignments next Fall will be determined by the system-wide desegregation plan, and petitioners -- like all other students at every public school in Chicago -- will be assigned so as to "provide for the establishment of the greater practicable number of stably desegregated schools." (Consent Decree Par.I.2.1, reprinted at Suggestion of Mootness, App. 5)

Petitioners also argue that, notwithstanding the mootness of their prayer for injunctive relief, they have "a continuing claim for money damages" based on the Complaint's boilerplate request for "such other and further relief . . . as the Court may deem just and proper." (Opposition, p. 3) This argument, however, is squarely at odds with petitioners' conduct throughout this litigation. Not once during the District Court proceedings did petitioners reveal their supposed "intent" to include a damage claim, not a single exhibit concerned monetary damages and no testimony was adduced on this issue. Similarly, not once in their several Court of Appeals submissions did petitioners argue a damage claim. So too, petitioners' Brief in this Court is silent on the question of damages. With all respect due petitioners, we submit that their damage theory is an afterthought bearing no relation to the actual record developed during the course of this litigation. We also note that neither petitioners nor the Government identifies a single student assignment case involving a damage award. Thus, even if there is some merit to the Government's position that damages could be awarded in an appropriate case, resolution of this novel issue is singularly inappropriate in the present context, where petitioners neither sought nor adduced evidence that could support such an award and where neither the District Court nor the Court of Appeals had the opportunity to address the issue.*/

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*/ In contrast to their silence on the question of damages, petitioners vigorously argued in the District Court and

(Footnote continued on following page)

Finally, petitioners' case is not saved by their contention that the provisions of the consent decree "provide no assurance that petitioners will not again be the victims of unlawful discrimination." By expressly providing that the Board's desegregation plan must be "constitutionally acceptable," the consent decree assures that neither these petitioners nor any students in the Chicago public school system will be "victims of unlawful discrimination" in pupil assignment. Similarly, the Government's concern with its inability to "predict the impact of the comprehensive plan" on students from the Gage Park and Morgan Park attendance areas underscores rather than rebuts the Board's position that this case is no longer ripe for adjudication. The Government's speculation that the Board might adopt, over the Government's objection, a

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(Footnote continued from preceding page)

Court of Appeals for an award of attorneys fees. However, they did not include the denial of fees as an issue on certiorari, and in all events such a claim cannot revive an otherwise moot case. To hold otherwise would lay to rest the doctrine of mootness, for all disappointed litigants retain the hope, however slim, that ultimate vindication will result in an award of attorneys fees and costs. See Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States 501 n.1 (1951 ed.) (collecting cases holding that controversies as to costs do not revive moot cases). Deposit Guarantee National Bank v. Roper, 48 U.S.L.W. 4279 (March 3, 1980), is not to the contrary. There, the issue was whether denial of class certification survived an offer of judgment to the putative class representatives. The decision in Roper, which is part of the peculiar jurisprudence of class actions, involved but did not turn on the possibility that named plaintiffs can collect for attorneys fees and costs from other class members. The case in no way suggests that a request for attorneys fees from the opposing party will keep alive an otherwise moot case.

system-wide plan incorporating some unidentified features of the quota plan is no reason to litigate this issue in the context of a plan that no longer exists. Rather, this issue, if it arises at all, should be litigated in the first instance in the District Court supervising the system-wide plan.*/

In sum, petitioners' dispute with the Board has ceased to be a live case or controversy. A decision on the merits by this Court would affect no one's concrete rights, while briefing and argument on the merits could well hinder the Board's fulfillment of its obligation under the consent decree to develop a system-wide desegregation plan. In these circumstances, the writ of certiorari should be dismissed and the Board should be allowed to develop and implement a system-wide desegregation plan without engaging in academic yet acrimonious litigation.

Respectfully submitted,

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*/ The Government's concern with the possible stare decisis effect the decisions below can be obviated by accepting the Government's suggestion that, when dismissing the writ of certiorari, this Court vacate the judgment of the Court of Appeals.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1356

KATHY SUE JOHNSON, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

1. I am counsel for the respondents in the above-captioned case.

2. Three copies of the respondents' Reply Memcrandum Suggestion of Mootness were hand-delevered this 15th day of October, 1980 to: Thomas H. Morsch, attorney for petitioners; Sybille Fritzsche, co-counsel for petitioners; Wade H. McCree, Solicitor General; and, Drew S. Days, Assistant Attorney General.

Thomas F. Gardner

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No. 79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1980

KATHY SUE JOHNSON, ET AL., PETITIONERS

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO SUGGESTION OF MOOTNESS

WADE H. MCCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1356

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v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO SUGGESTION OF MOOTNESS

On October 2, 1980, the Board of Education of the City of Chicago filed its Suggestion of Mootness based upon the entry of a consent decree in *United States* v. *Board of Education of the City of Chicago*, No. 80 C 5124 (N.D. Ill.) (S.M. A-3)[1] and the Board's decision of October 1, 1980 (S.M. A-18) to discontinue, at the end of the 1980-1981 school year, the Student Racial Stabilization Quota

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[1]"S.M." refers to respondent's Suggestion of Mootness. The United States, by letter of September 30, 1980, informed the Court of the entry of the consent decree and provided the Court copies of the complaint and the consent decree.

Plan (hereinafter referred to as "the Plan") at issue in this case. In our judgment the case is not now moot.

1. Neither the consent decree nor the decision to discontinue the Plan affects the operation of the schools during the current school year. Thus, the case is " 'live' " and the parties do not " 'lack a legally cognizable interest in the outcome.' *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

2. The question remains whether the case may become moot (*cf. DeFunis* v. *Odegaard,* 416 U.S. 312 (1974)) and whether the possibility of future mootness warrants dismissal of the writ of certiorari. In our view, dismissal is not warranted.

The complaints in this case challenged the Plan because it resulted in the exclusion of the plaintiffs from integrated neighborhood high schools and their assignment to segregated and more distant high schools. The complaints sought declarations that the Plan was unconstitutional and injunctive relief forbidding further implementation of the Plan and requiring that excluded black students be allowed to enroll in Gage Park and Morgan Park. The complaints did not seek comprehensive changes to overcome the effects of past discrimination in Chicago's student assignment system. While they did not explicitly seek damages, they were brought under 42 U.S.C. 1983 and sought "such other and further relief, including costs and reasonable attorneys' fees, as this Court shall deem just and proper." Whatever the disposition of the plan, any damage claim would not become moot. *Watts* v. *Brewer*, 588 F. 2d 646, 648 (8th

Cir. 1978); *Davis* v. *Village Park II Realty Co.*, 578 F. 2d 461, 463 (2d Cir. 1978).[2]

In order for the injunctive claims to become moot, two conditions must be satisfied: (a) it must be possible to say with assurance that there is no reasonable expectation that the kind of discriminatory assignments challenged here will recur; and (b) events must "have completely and irrevocably eradicated the effects of the alleged violation," *i.e.*, the previously excluded students must receive relief. *County of Los Angeles* v. *Davis*, *supra*, 440 U.S. at 631.

The consent decree and prospective rescission of the Plan could satisfy those conditions in the future, but we are unable to state with certainty that they will. The consent decree itself is silent with respect to the disputed enrollment quota plan. It obligates the Board to develop a comprehensive student desegregation plan for implementation in the 1981-1982 school year following approval of the plan by the United States and the court. The Board is to present its comprehensive plan to the Court and the Justice Department by March 11, 1981, "except as [the time schedule is] modified by agreement between the Board and the Department of Justice or as extended by leave of Court" (S.M. A-17). If the parties do not agree on the contents of the plan, "the disagreement

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[2]Petitioners were not required to allege specifically any claim they might have for nominal damages. *Basista* v. *Weir*, 340 F. 2d 74, 87 (3d Cir. 1965). See *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Of course, the individual Board members would enjoy at least a qualified immunity from liability in damages where their actions were taken in good faith (*Wood* v. *Strickland*, 420 U.S. 308 (1975)), and an absolute immunity if they were deemed to have acted in a legislative capacity. See *Lake Country Estates, Inc.* v. *Tahoe Planning Agency*, 440 U.S. 391 (1979). The Board would not enjoy the same immunities, and a damage remedy could be available, unless this is a case in which "countervailing considerations" militate against such a remedy. *Owen* v. *City of Independence*, No. 78-1779 (Apr. 16, 1980), slip op. 28.

will be submitted to the court for resolution" (S.M. A-11). While we expect the content of the plan to be resolved expeditiously, the decree does not provide certainty as to when a fully acceptable plan will be in place.

The Board quotes "[t]he four 'Basic Objectives' of the desegregation plan" contemplated by the consent decree (S.M. 2). Because, in our view, the enrollment quotas here at issue violate the Equal Protection Clause (U.S. Brief 12-14), the United States would be unable to approve a desegregation plan incorporating their segregative features. We are unable to represent, however, that the district court would not approve such a plan.[3] Nor can we predict the impact of the comprehensive plan on those plaintiffs who have already been excluded from Gage Park and Morgan Park. This question is substantial, in light of Section 5.2 of the Consent Decree. If Gage Park and Morgan Park are treated as "already stably integrated,"[4] "the plan may exclude [them] from reassignment of students if the extent of integration is within a reasonable range of that to be achieved in the schools referred to in Sec. 2.1" (S.M. A-7).[5]

The rescission of the Student Racial Stabilization Quota Plan (S.M. A-18) increases the chances that the injunctive claim may become moot. However, it does not state how students are to be assigned in September 1981,

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[3]The decisions below could have a *stare decisis* effect if they are left standing.

[4]We do not view them as stably integrated, because the Board has already resorted to mandatory reassignment to maintain their racial composition.

[5]Section 2.1 states: "*Desegregated Schools*. The plan will provide for the establishment of the greatest practicable number of stably desegregated schools, considering all the circumstances in Chicago" (S.M. A-5).

except by reference to the consent decree in *United States* v. *Board of Education of the City of Chicago*, *supra*.

3. The judgment below should be vacated if this Court determines that circumstances render it inappropriate to decide the case on the merits. By vacating the judgment and remanding the case to the court of appeals, the Court would be acting in accord with its normal practice in cases in which developments subsequent to the grant of certiorari make it inappropriate for the Court to decide an issue thought worthy of review. *County of Los Angeles* v. *Davis*, *supra*; *Weinstein* v. *Bradford*, 423 U.S. 147 (1965); *Preiser* v. *Newkirk*, 422 U.S. 395 (1975); *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975). *Cf. United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

It is therefore respectfully submitted that the case is not moot, but that if this Court decides not to reach the merits of this case, the judgment of the court of appeals should be vacated.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10

No. 79-1356

In the Supreme Court of the United States

OCTOBER TERM, 1979

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

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BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Is the deliberate exclusion solely on account of race of over 1630 black children and not a single white child from two Chicago public high schools in a three year period rendered lawful by a school board's stated purpose of preventing white flight in a racially changing neighborhood?

2. Is such an exclusion permissible where the excluded black children cannot obtain an integrated education except by being bused 1½ hours each way to an alternative school and where most of such children in fact attend segregated schools?

3. Does a school board's asserted purpose of preventing two schools from becoming predominantly black preclude strict judicial scrutiny of its actual motives where the board has consistently failed to adopt less discriminatory alternatives which equalize the burdens between blacks and whites?

4. Does the Board's stated purpose justify an explicit racial classification which places the entire burden of the Board's policy on black children alone?

LIST OF PARTIES

Plaintiffs (various children in the Morgan Park and Gage Park areas by their parent or guardian): Kathy Sue Johnson, by Shelby Johnson; Lynne M. Stevenson and James Stevenson, by Charles E. James; Karla Evans by Annie Evans; Linda A. Green by Reginald S. Green; Yrhonda T. Hawkins, by Joseph Hawkins; Gregory D. Robinson and Dereen R. Herron, by Anita Robinson Herron; Tammie I. Hickey, by Ben W. Hickey; Kimberly Ann Johnson, by Brenda M. Johnson; Tobbie L. McCline, by Franklin L. Jones; James E. Martin, Jr., by Mary Martin; Madge Mathews, by Lillie M. Mathews; Donnell Traylor, by Anita Traylor; Darcel

Milton, by Reverend Frank E. Milton; Sherry Rhodes, by Betty J. Allen; Edward Banks and Torrence Banks, by LaVolia Banks; Gwendolyn Brown and Yvonne Brown, by Florence Jackson; Renard Cleggett and Retunja Cleggett, by Louise Cleggett; Will A. Collins, by Hattie Collins; April Dotson, Hope Dotson and Cleon Dotson, by Sallie Dotson; Phyllis Graham, by Florence Graham; Charlotte Jackson, by Frank Jackson; Dorothy Ann Laseter, by Windell Laseter, Sr.; Earl D. Liggins, by Annie Hammond; Andrienne R. Reed and Joy Marcia Reed by Dorothy Kingsley; Lonnetta Manuel and Regina Manuel, by Lonnetta Manuel; Sarah McNuckle, by Elma McNuckle; Melvin Parker, by Murtis Parker; James Pigue, by Frankie Pigue; Olivia Riggins and Judy Riggins, by Virdie Riggins; Bernard Robinson and LaWanda Scott, by Yvonne Robinson; Judy Strong, by David Strong; Lori Waller and Eric Waller, by Ethea Waller; Timothy Christmas, by Cora Watson; Felicia Nickols, by Barbara A. Nickols; Regina Ausley, by Corrie Ausley; Demetria Baker, by Dora Baker; Adrienne Michele Clayton, by Christine Clayton; Hazel C. Faulkner, by Minnie Faulkner; Gueterris Johnson, by Eldora Johnson; Rochelle Knight, by Dorothy Knight; Gail McLaurin, by Bernice McLaurin; Teresa Mumphus, by Dorothy Mumphus; Donnell Robison, by Bessie Baker; Antoine Nelson, by Ruth Nelson; Derrick Shelton, by Charles Shelton; Ruby Lynette Turner, by William Turner; Leonita Renee White, by Lolita R. White; Cynthia Wilkins, by Bernice Wilkins; Stephan Williams and Veronica Williams, by Theressa Williams; Bryce Wormley and Sharon Bell, by Carole Wormley; Delaine Ellens, by Arthur W. Ellens; Rose S. Myatt, by Velma Myatt; Janelle Parker, by Lincoln B. Parker; and Sylvia L. Westbrook, by John L. Westbrook.

Defendants: Board of Education of the City of Chicago; John D. Carey, Mrs. Carey B. Preston, Edgar G. Epps, Bernard S. Friedman, Mrs. Louis A. Malis, Henry W. McGee, Thomas J. Naydar, Mrs. William L. Rohter, Gerald L. Sbarbaro, Mrs. Carmen Velasquez and Mrs. W. Lydon Wild, individual members of the Board of Education of the City of Chicago, and Joseph P. Hannon, General Superintendent of Schools.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1356

KATHY SUE JOHNSON, etc. et al., and DARCEL MILTON, etc. et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, et al.,

Respondents.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 604 F.2d 504, and the unreported findings of fact and conclusions of law of the District Court, are reproduced in the Appendix to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1979. A timely petition for rehearing and rehearing *en banc* was denied on December 6, 1979, and a petition for *certiorari* was filed within 90 days of that date. *Certiorari* was granted on July 2, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment XIV, Section 1:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

20 U.S.C. §1703(c):

> "No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—
>
> • • •
>
> "(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if

the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;"

STATEMENT OF THE CASE

The Background of the Quota Plans

Public schools in the City of Chicago are generally organized on a neighborhood school basis, and exhibit a pattern of substantial segregation. In 1976, for example, 85% of black and Hispanic high school students attended schools that were more than 85% minority (Pl. Ex. 2). The school system as a whole in 1976 was 25% white (*id.*), but 79% of Chicago's public elementary schools and 67% of its public high schools had student bodies which were more than 85% majority or 85% minority. (*Id.*) Despite considerable pressure from the Illinois State Board of Education to eliminate segregation under Ill. Rev. Stat., ch. 122, §10-21.3, the Chicago Board has refused to adopt any mandatory measures to desegregate. As a result of alleged segregation in the Chicago public schools, the Department of Health, Education and Welfare on April 9, 1979, sent the Chicago Board a notice of ineligibility for funds under 20 U.S.C. §§3191-3207 and 42 U.S.C. §2000d, and on April 21, 1980, the Department of Justice notified the Chicago Board of its intent to file suit.*

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* These facts are common knowledge in Illinois, and some of them are also specifically reflected in the Chicago Board's Report, *Access to Excellence, Recommendations for Equalizing Educational Opportunity*, at xv, xix, which both parties cited to the Court of Appeals.

The explicit racial quotas involved in this case were adopted at two public high schools on Chicago's far south side—Gage Park High School (5630 S. Rockville Avenue—2600 West) and Morgan Park High School (1744 W. Pryor Avenue—11200 South). The attendance areas for these schools are generally speaking located between all-minority schools to the east, and predominantly white schools to the west. (Pl. Exs. 2, 46).* Although racial quotas are employed in connection with admissions to certain special city-wide "magnet" schools, black and Hispanic children living in the Morgan Park and Gage Park areas are the only children in the entire Chicago public school system excluded from any neighborhood school because of their race. (R. 9, ¶18 at 10-11).**

The quota for Gage Park High School, adopted in May, 1975, established a 48% black, 42% white, 8% Hispanic and 2% principal's option school-wide quota for the school. (J.A. 24). Black students were thereafter admitted to Gage Park only to the extent that sufficient numbers of white students were in attendance so that the predetermined school-wide black-to-white ratio of 48% to 42% could be maintained. The Morgan Park quota, adopted in March, 1976, established a 50% black -50% white quota which was applied to each entering class. (J.A. 25). However, the Morgan Park quota admitted 350 black freshmen even if less than 350 white freshmen applied. (A. 36, ¶ 9; J.A. 25).

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* These white schools are Kelly (78.1% white in 1976), Kennedy (89% white), Bogan (97.4% white), Hubbard (93.4% white), and Curie (75.7% white) (Pl. Ex. 2).

** Unless otherwise indicated, citations to "R. ___" are to the Record in *Johnson*. Citations to "A. ____" are to the appendix to the Petition for Certiorari and citations to "J.A. ____" are to the Joint Appendix.

The quotas are separately administered to each race. The elementary school principals in the two high school attendance areas separate the names of all 8th grade students by race, and forward a list for each race to the high school. Lottery drawings for each race are held, and the students are listed in the order their names are drawn on separate lists for "W" (white), "B" (black), and "S" (Hispanic) students. (A. 37, ¶ 14; Pl. Exs. 20-30, 63-72). Students are admitted from the lottery lists, in order, until the quota for their race is filled. (A. 37, ¶ 14).

The quota levels for Gage Park were chosen at the request of a white spokesman, Edward Platkus, chairman of the Gage Park [Parents] Council ("we would be willing to settle at approximately where we are at now." Def. Ex. 35, at 29. See also *id.* at 37). And the quotas were adopted, at least in Morgan Park, over the express and determined opposition of the black community's representatives (Pl. Ex. 74 at 40-42 (opposition by Rep. Emil Jones), 44-47 (opposition by Ald. Wilson Frost)), and despite a survey showing that the vast majority of parents found all the alternative schools unacceptable. (Pl. Ex. 74 at 25; Pl. Ex. 75 at 7).

In each case, the Board's *stated* purpose for the quota was to reduce overcrowding and prevent increasingly black enrollments. (A. 36, ¶ 12). In particular, the Board contended that its quotas were necessary to prevent "white flight"—the refusal of white children to attend Morgan Park and Gage Park without the assurance of a ceiling on black admissions. (*Milton*, R.7, at 7; *Johnson*, R.9, at 5-6).* Accordingly, the quotas were specifically designed

* There was no direct testimony presented at trial about the alleged "white flight" phenomenon. For example, no expert testified that white flight had occurred or that the quotas would prevent

(footnote continued)

to exclude blacks from Morgan Park and Gage Park High Schools. As the District Court explicitly found, the quotas were intended to reduce black enrollments, and the quota levels for black students were necessarily set at a level lower than that at which blacks would have applied and would have been admitted but for the ceilings imposed on them. (A. 36, ¶ 12).

The quotas had their intended effect. In three school years, over 1630 black children were excluded, and not a single white child. (A. 47, ¶ 42). The District Court found (A. 37, ¶ 13):

> "No white student was ever denied admission as a result of the quotas instituted at Gage Park and Morgan Park High Schools, but hundreds of black and Hispanic students have been denied admission annually since the racial quotas were instituted."

The admission of every white student who sought to attend was evident as soon as the lottery drawings were held. On the post-drawing lottery lists for each race (Pl. Exs. 20-22, 24-26, 64-66; see Pl. Exs. 29-30, 71-72), a red line was drawn under the name of the last student admitted under the quota. In every case, the red line on the "W" list appeared under the last name on that list. By contrast, hundreds of names were below the red line on the "B" list for each school. (A. 37-38, ¶¶ 15-20.)

(footnote continued)

it. The statistics in evidence, however, suggest that racial change in Morgan Park and Gage Park was the product of two factors. First, there appears to have been an influx of black residents into the Gage Park and Morgan Park areas, and a corresponding increase in the absolute numbers of black students. (A. 35, ¶¶ 5-6). Second, although most of the school age children in each area were white (*id.*), the vast preponderance of blacks, but only about half of the whites, chose to attend the public schools. (Pl. Exs. 41-43).

The quota plans achieved the prescribed quota levels by excluding increasing numbers of black children each year until the established ceilings were reached. (See A. 40, ¶ 26). However, there was no evidence that the quota plans were effective in reversing the decline in white enrollments at the two schools. To the contrary, between 1975 and 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071. (Compare Pl. Ex. 1 with A. 40, ¶ 26).

At the same time, the excluded black children were effectively denied an integrated education. When the quotas were adopted, the Board announced that excluded black children could attend any one of a list of so-called "underutilized" public high schools, using public transportation. (A. 39 to A. 40, ¶ 24). The only underutilized schools with significant white enrollments were located on the north side of Chicago, at least 11.4 miles from Gage Park and 18 miles from Morgan Park. These schools could be reached only by a complicated journey on public bus and rapid transit lines. (A. 41, ¶¶ 28-29). Thus, in the 1975-76 and 1976-77 school years, virtually all the excluded black children attended schools which were entirely or predominantly black and Hispanic, and *not a single child* attended any white school made "available" by the Board. (A. 42 to A. 44, ¶¶ 30-32).

At the time the quotas were adopted, the Board was at best indifferent as to the ability of excluded black children to obtain an integrated education elsewhere. At the hearing preceding the adoption of the Gage Park quota, there was no discussion whatsoever about whether excluded students would be able to attend an integrated school. (Def. Ex. 35). At the Board's hearings on the Morgan Park quotas, a black parent predicted that students excluded from Morgan Park High School would

be denied the opportunity to attend an integrated school (statement of Anna Thomas, Pl. Ex. 74, at 28-29)—a fact which would have been obvious to the Board had it examined the effects of the Gage Park quota, already in operation for a year. It was not until plaintiffs filed Interrogatories in this case that the Board even sought to determine whether excluded black children were attending integrated schools. (R.16, ¶1(d) at 2; R.25, Ex. 2).

Proceedings Below

Petitioners are black elementary and high school students who are adversely affected by the quotas at Morgan Park and Gage Park. They brought the action below seeking a declaratory judgment, and injunctive and other relief.

This case was presented to the trial judge entirely on a documentary record. No Board representative testified as to the rationale for the quotas, and no demographer testified as to either past patterns or future projections of racial change. The documentary evidence as to patterns of racial change was sketchy and equivocal. For example, the Board sought to establish the need for the quotas by comparing statistics showing past racial change in Gage Park and Morgan Park with statistics showing rapid racial change in certain other neighborhoods, like the Fenger, Orr, and Bowen high school attendance areas (*e.g.*, A. 21). But the Record equally contains evidence of schools like Kenwood which from 1970 to 1976 remained constant at 26% white (Pl. Ex. 2, 50), and absolutely no explanation of Record of why Gage Park or Morgan Park were more like Fenger, Orr or Bowen than Kenwood. And the statistics of Record as to past racial change cannot be evaluated meaningfully because they are nowhere explained in the context of overall enrollment patterns in Chicago, in which the overall white school enrollment dropped from 34.6% to 24.9% white from 1970-76 (*Id.*).

The evidence also casts doubt on the potential efficacy of the quotas. For example, even high white attendance levels do not prevent racial change, for Kelvyn Park dropped from 84.8% white to 58.2% white between 1970 and 1976. (*Id.*). The overall rationality of the quota plans is also brought into question by the evidence that some schools made available to excluded black students *themselves* exhibited rapid racial change during this period (Lakeview went from 64.2% white in 1970 to 43.6% white in 1976 and Senn, from 61.5% white to 44.0% white, Pl. Ex. 2, 50)—but there is no explanation why a Board purportedly intending to prevent racial change chose to bus excluded black students to such schools. In short, on the critical points of the need for the quotas, their rationality, and anticipated efficacy, there was little more in the record than the *ipse dixit* of the Board.

After both sides presented their evidence and rested, the District Court announced that it was prepared to find the quota plans unconstitutional, but would reserve ruling to allow the Board to consider modifications to the quota plans. The Board thereupon offered excluded black children free bus transportation to various schools including some predominantly white or integrated schools principally on the Chicago's north side. This involved a 1½ hour bus trip each way. (Doc. Incorp. by Order, R.71, Beverly Review, September 14, 1977).* In the 1977-78 school year, only 102 of the 1632 excluded children availed themselves of that option (A. 47, ¶ 42). The following year, after the exclusion of several hundred additional black children, the Board reported that 359 students were participating in

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* The Board also amended its modified plan in certain minor respects (relating to publicity, student counseling, etc.) as a consequence of suggestions made by petitioners in the District Court. (Doc. Incorp. by Order, R. 71, Letter of July 22, 1977; Tr. August 5, 1977, J.A. 31-38)

its busing program (A. 14). Recent reports by the Board for the 1979-80 school year indicate that after still another year of exclusion, the number of black children availing themselves of the Board's busing option has dropped to 285. (Chicago Board of Education, "Access to Excellence, Summary of Continuing Programs," Jan. 31, 1980, at 5).

In revising its quota plans, the Board failed to adopt alternatives less burdensome on blacks. Plaintiffs, in fact, suggested a number of such alternatives, including a broader desegregation plan, efforts to integrate the predominantly white schools nearer to Morgan Park and Gage Park, and a plan involving the pairing of Gage Park and Curie, an *underutilized* school less than 2 miles away which was 76% white. (Doc. Incorp. by Order, R. 71, Letter of July 22, 1977). The sole reason the Board rejected the pairing proposal was that it would discomfit whites living in the Curie area. As the Board's counsel put it, Curie was located in Marquette Park (an area that had witnessed racial disturbances by whites protesting against an influx of minorities), so that a pairing program involving "a large influx of minority students" allegedly "would be educationally disruptive." (Tr., August 5, 1977, at 7-10, J.A. 36).

The District Court held that although the original quota plans were unconstitutional, the modifications adopted by the Board following submission of the case to the Court cured any Constitutional defects. (A. 48, ¶¶ 3, 5).* The Court of Appeals affirmed in all respects. The petition for *certiorari* was granted on July 2, 1980.

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* The District Court also found that these modifications to the quota plan which were incorporated in the District Court's final order "would not have been adopted but for the efforts of plaintiffs and their counsel" (A. 48 to A. 49, ¶ 6). Nevertheless, the District Court, while awarding costs to plaintiffs, denied their request for attorneys fees under 20 U.S.C. §1617 and 42 U.S.C. §1988, prin-

(footnote continued)

SUMMARY OF ARGUMENT

At the outset, it is important to note what this case does *not* involve.

Petitioners do not contend that school children have an absolute right to attend a neighborhood school. Nor do they urge that a school board which treats the races equitably may not take race into account in school assignments as part of an effort to desegregate its school system. There is also no objection to true "affirmative action" quotas which limit opportunities for some whites to benefit blacks, as part of an effort to overcome the effects of past racial discrimination.

What this case does involve is the right of black children to equality of treatment with white children. Once the Board of Education has decided to afford its pupils the advantages of neighborhood schools, it cannot single out black children and deny them this benefit because of their race. Black children in Morgan Park and Gage Park are suffering the effects of a dual discrimination—they alone are singled out, stigmatized, and excluded by a racial quota plan, and they alone are forced to bear tangible burdens of exclusion and travel to distant schools.

Although the Board seeks to portray its motives as benign, this is not a true "affirmative action" case. The sole victims are blacks—the traditional victims of discrimination—and the program's *de jure* discrimination

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(footnote continued)

cipally on the ground—not even defended by the Board on appeal—that plaintiffs' counsel was not entitled to fees because it accepted the case on a *pro bono publico* basis through the Chicago Lawyers Committee for Civil Rights under Law (Tr., Jan. 13, 1978). The District Court also expressed "doubts" whether plaintiffs "prevailed" within the meaning of the attorneys fee statute, because they continued to urge that the plans were unconstitutional even after the Board modified them. (Tr., Jan. 13, 1978).

against blacks is not intended to cure past discrimination. In fact, on the Board's own rationale the quotas are designed to prevent "white flight," which results, if at all, from white prejudice against attending school with large numbers of blacks. The Board's concession to this white prejudice is to inflict deprivations upon black children. Such a rationale cannot justify racial quotas disadvantaging blacks. And this is particularly true where the Board's quotas have been unsuccessful in achieving their purported integrative purpose. The feared decline in white enrollments has not been halted, and the vast majority of excluded black children attend segregated black schools.

Nor is there any justification for the independent discrimination of imposing the entire burden of achieving the Board's objectives on black children. A failure to distribute the burdens of integration equitably among the races is an independent violation of the Fourteenth Amendment. Not only has the Board failed to devise an equitable program, but it has refused to adopt the less discriminatory and potentially more integrative alternative involving Gage Park and Curie High Schools, for the sole reason that it would be opposed by the white residents of the Curie area.

Indeed, when the facts are analyzed, it is obvious that the quotas were designed to benefit whites and whites alone. For example, until this suit was brought, the Board did not even consider whether excluded black children would attend integrated schools. Rather, the evidence suggests that the Board was seeking to preserve Morgan Park and Gage Park for the white community and to establish those neighborhoods as buffer zones between the black inner city and the predominantly white neighborhoods to the west. In short, the Record utterly fails to establish the compelling state interest necessary to support a racial classification disadvantaging blacks.

ARGUMENT

1. Introduction.

At issue in this case is the legality of explicit racial quotas allegedly designed to maintain two public high schools as disproportionately white in a generally segregated and predominantly minority school system, where the entire burden of attaining the Board's objectives is imposed exclusively on blacks and none is placed on whites.

The racial discrimination in this case has two distinct aspects. The first inheres in the operation of the racial quotas themselves as a ceiling on black enrollments. Children who would normally attend Morgan Park and Gage Park High Schools are separated according to race, and each race is subject to a separate lottery in which every white child is admitted and hundreds of black children annually are excluded. It is difficult to imagine a more explicit discrimination against black children on the basis of their race.

There is, however, another aspect of the racial discrimination, which relates to the burdens which the Board of Education has imposed exclusively on black children. Although professing to seek racial balance, the Board took no steps, either in these neighborhoods or elsewhere in its highly segregated school system, to achieve integration in a manner which would place comparable burdens on white children. Thus, excluded black children are subject to unequal treatment not only compared with their white neighbors—each of whom is allowed to attend Morgan Park and Gage Park High Schools—they are also subject to discrimination compared with all other white children in the Chicago public school system, none of whom

is excluded from his neighborhood school or made to suffer any other burden under the rubric of "integration."

This dual discrimination results in tangible deprivations to black children in Morgan Park and Gage Park. Every black child is told that he, unlike his white classmates, is unwanted in his neighborhood school because of his race. As this Court noted in *Brown* v. *Board of Education,* 347 U.S. 483, 494 (1954), "To separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." This distinction between the races is not done subtly, such as by race-conscious drawing of boundary lines. Rather, it is achieved through a blatant separation of children by race and the holding of separate lottery drawings for whites and blacks. The negative psychological effect on black children—whether or not excluded—is thus maximized.

Blacks actually excluded from Morgan Park and Gage Park are further disadvantaged by being deprived of the many benefits which a neighborhood school can provide and which the Chicago Board, by organizing schools on a neighborhood basis, has decided that its school children should enjoy. *See Keyes* v. *School District No. 1,* 413 U.S. 189, 245-48 (1973) (Powell, J.). "Any child . . . who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and his privacy." *Id.* at 247-48. The travel burden is particularly onerous for the excluded black children who desire an integrated education and must travel 1½ hours each way to and from the city's north side. Excluded children lose the sense of community a neighborhood school can provide, *id.,*

and their participation in after-school activities and their parents' involvement and influence in school affairs is severely hampered, if not eliminated. No white child in Morgan Park, Gage Park, or elsewhere in the City of Chicago is subject to these disabilities. The point is not that petitioners have an absolute Constitutional right to attend their neighborhood schools, or that neighborhood schools are essential for public education. Rather, petitioners' right is to equality of treatment: where the benefits of a neighborhood school are afforded to whites, they may not be denied to blacks because of their race.*

2. The applicable legal standards require that the quotas be invalidated.

For a quarter of a century racial classifications adversely affecting minorities have been uniformly struck

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* Petitioners also do not contend that a school board is prohibited from taking race into account in school assignments as part of an effort to desegregate its school system. First, the quotas here are not part of a widespread desegregation effort. Rather, they apply to only two schools in a generally segregated system, which itself raises the danger that the selection of narrow objectives was itself racially discriminatory. See pp. 26-27 *infra*. Desegregation of an entire system, by contrast, tends to provide widespread and more evenhanded benefits, and thus has greater Constitutional significance in any balancing test. Moreover, the only persons adversely affected by the quotas here are blacks, the traditional victims of discrimination, and the Board has refused to place any burdens on whites, anywhere in Chicago, for the purposes of integration. See pp. 26-27, 29-32 *infra*. The resulting defect of these quotas is not that they take race into account, without more, but that they afford blacks unequal and inferior treatment. Where a system-wide desegregation effort distributes burdens equitably between the races, however, blacks and whites are treated equally, so there is no equal protection violation. In the absence of such a violation, there would be no basis for invalidating a desegregation program.

down by this Court. *E.g., Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Loving* v. *Virginia,* 388 U.S. 1 (1967). The principle of equality which invalidates such classifications stands high in the Constitutional hierarchy. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded in the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943), *quoted* in *Loving* v. *Virginia,* 388 U.S. 1, 11 (1967).

The established legal standard for evaluating racial classifications which disadvantage blacks is the exacting "strict scrutiny/compelling state interest" test. Racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954) and in scrutinizing them, courts must abandon the deference to legislative judgments characteristic of traditional standards of review, *McLaughlin* v. *Florida,* 379 U.S. 184, 192-93 (1964), apply the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944) and demand a "very heavy burden of justification," *Loving* v. *Virginia,* 388 U.S. 1, 9 (1967). The burden of satifying this test is so heavy that no classification disadvantaging minorities has been upheld by this Court since the wartime Japanese curfew and eviction cases, *Hirabayashi* v. *United States,* 320 U.S. 81 (1943) and *Korematsu* v. *United States,* 323 U.S. 214 (1944).* As applied to racial classifications ad-

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* "Significantly, those cases were decided not only in time of war, but in an era before the Court had held that the Due Process Clause of the Fifth Amendment imposes the same equal protection standard upon the Federal Government that the Fourteenth Amendment imposes upon the States." *Fullilove* v. *Klutznick,* 48 U.S. L.W. 4979, 5000 n.3 (S.Ct., July 2, 1980) (Stewart, J.)

versely affecting blacks, strict scrutiny has been "strict in theory, but fatal in fact." *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979, 4995 (Powell, J.), 4998 (Marshall, J.) (S.Ct., July 2, 1980).

The controversy surrounding true "affirmative action" quotas—which limit the opportunities of whites in an effort to overcome past discrimination against blacks—is entirely irrelevant to this case. Despite the Board's characterizations, this is not an "affirmative action" or benign program. Like classic anti-black discrimination, the racial quotas in this case victimize only blacks.

Whatever standards are applied to quotas which deny opportunities to some whites in order to benefit blacks, see *Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (S.Ct., July 2, 1980), anti-black quotas stand on a different footing. One cannot ignore the history of anti-black discrimination in this country, see *University of California Regents* v. *Bakke,* 438 U.S. 265, 387-96 (1978) (Marshall, J.), or the fact that racial prejudice against minorities is still so widespread that a mass of federal and state anti-discrimination laws is thought necessary to combat it.

The special scrutiny which must be given to anti-black classifications derives from the original purpose of the equal protection clause. Although the Fourteenth Amendment was later given an expansive reading by this Court, it was adopted in the aftermath of Emancipation for the specific purpose of ensuring equal treatment for the newly-freed slave. Its "one pervading purpose" was to secure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." *Slaughter-House Cases,* 16 Wall. 36, 71

(1873). *Accord, Palmer* v. *Thompson,* 403 U.S. 217, 220 (1971) ("Thus, the equal protection clause was principally designed to protect Negroes against discriminatory action by the States."). Since blacks were the intended beneficiaries of the Fourteenth Amendment, they surely cannot be made the victims of a racial classification merely because a school board chooses to label it benign.

Concerns of public policy compel the same conclusion. This is not a case where a political majority has disadvantaged itself to achieve a benign purpose. Rather, it has disadvantaged a political minority. See Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U.Chi. L.Rev. 723, 727 (1974) (justifying reverse discrimination because equal protection concerns are not triggered by the majority's decision to discriminate against itself); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938) (equal protection clause designed to protect politically disadvantaged groups). And unlike true "affirmative action" quotas, the quotas here harm a class with the "traditional indicia of suspectness," *University of California Regents* v. *Bakke,* 438 U.S. 265, 357 (1978) (Brennan, White, Marshall and Blackmun, JJ.); they "operate[ ] to stigmatize or single out [a] discrete and insular" minority group, *id.* at 374; they relegate excluded children to other schools which, in a neighborhood school system, creates "a significant likelihood that they will be treated as second-class citizens because of their color," *id.* at 375; and they "establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted." *Id.*

Thus, the fact that certain "affirmative action" quotas have been upheld, *e.g., Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979 (S.Ct., July 2, 1980), is no basis for departing from the "fatal in fact" review of the anti-black quotas in-

volved in this case. In *Fullilove, supra,* some Justices would have found the quota unconstitutional because the equal protection clause "absolutely prohibits invidious discrimination by government." *Id.* at 4999-5002 (Stewart, J., joined by Rehnquist, J.). This case is *a fortiori.* Other Justices voted to uphold the *Fullilove* quota in part because they found the strict scrutiny test inapplicable to "racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." *Id.* at 4998-99 (Marshall, J., joined by Brennan and Blackmun, JJ.). But even these Justices recognized that anti-black classifications were to be overturned under traditional strict scrutiny review. "[A]ny statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program." *Id.* at 4998. Thus, the fact that the quotas here disadvantage blacks rather than whites is itself sufficient basis for their invalidation.

In addition, the quotas here are invalid because they do not purport to cure past discrimination. At best, they are designed to prevent a future situation which would result, if at all, from the voluntary and lawful acts of private individuals. Since the Japanese cases, this Court have never sanctioned a present discrimination against anyone—black or white—except when designed in some fashion to remedy past discrimination. *See, e.g., Fullilove* v. *Klutznick,* 48 U.S.L.W. 4979, 4988-89 (S.Ct., July 2, 1980) (Burger, C.J.) (Congressionally-mandated racial preference adversely affecting whites justified as attempt to cure the effects of past discrimination); *University of California Regents* v. *Bakke,* 438 U.S. 265, 369 (1978) (Brennan, White, Marshall and Blackmun, JJ.) (racial classifications by a state government permitted "to re-

move the disparate racial impact its actions might otherwise have and if there is reason to believe the disparate impact is itself the product of past discrimination").

Indeed, certain Justices have required an even higher standard of justification—the existence of a past Constitutional or statutory violation. *See Fullilove* v. *Klutznick, supra,* 48 U.S.L.W. at 4992 (Powell, J.) ("But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations"); *id.* at 5001 (Stewart, J.) ("And a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination."). Imposition of a present disadvantage, particularly upon whites, to remedy the effects of past discrimination against blacks may be justified as a remedial program. But present discrimination, especially against blacks, is not justified by the possibility of future segregation which would result, if at all, from demographic changes rather than from past discrimination. *Cf. Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 434-37 (1976). Indeed, the best that can be said for these quotas is that they seek to prevent the effects of racial discrimination by whites, who would refuse to attend school with large numbers of blacks. The only ones who bear the burden of this discrimination, however, are black children. Such a program can scarcely be justified as remedial.

3. The Board's rationale for the quotas does not support racial discrimination against blacks.

In defending the exclusion of blacks because of their race, the Board of Education advances its stated purpose of "stabilizing" school enrollments in racially-changing neighborhoods. Assuming *arguendo* that this stated pur-

pose were both genuine and factually supported, it does not justify quotas that discriminate against blacks.*

First, the *very purpose* of the one-sided racial quotas in this case "is to assure within [a] student body some specified percentage of a particular group merely because of its race." *University of Cailfornia Regents* v. *Bakke,* 438 U.S. 265, 307 (1978) (Powell, J.). Such quotas are "discrimination for its own sake" and "facially invalid." *Id.*

In addition, the Board's effort to justify discrimination against black children by using the rhetoric of "integration" is misplaced. It was the very purpose of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) to eliminate *de jure* segregation because its existence, *ipso facto,* was deemed to be a stigma of inferiority. Here, the Board reintroduces just such a stigma by adopting explicit *de jure* quotas under the rubric of preventing *de facto* racial separation. In effect, the Board is allowing the tail to wag the dog. *De facto* racial separation is not Constitutionally forbidden, *Keyes* v. *School District No. 1,* 413 U.S. 189 (1973), and thus can hardly justify "compellingly" the use of *de jure* programs which stigmatize blacks as requiring treatment separate from—even if equal to—that accorded whites. Analogously, in *Linmark Associates, Inc.* v. *Willingboro,* 431 U.S. 85, 96-97 (1977), this Court held that preventing *de facto* segregation did not justify infringement of First Amendment rights. Even if *bona fide,* such a purpose *a fortiori* cannot justify an impairment of black children's rights to equality under the Fourteenth Amendment.

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* As will be noted below, pp. 24-28, *infra,* the record is bare of any justification, compelling or otherwise, for the placing of burdens exclusively on black children.

Even more important, the Board's purpose for the quotas cannot be accepted as "compelling" because it is based on racial prejudice against blacks. Even on the Board's own rationale, the quotas in Morgan Park and Gage Park are designed tc prevent "white flight." White flight, however, is merely a result of the disinclination of whites to attend school with blacks. Rather than resisting white flight, the Board is catering to white prejudice by giving whites a guaranteed ceiling on black enrollments in their neighborhood schools. Needless to say, discrimination against blacks cannot be justified as necessary to satisfy white prejudice. *E.g., Watson* v. *City of Memphis,* 373 U.S. 526, 536-38 (1963); *Taylor* v. *Louisiana,* 370 U.S. 154 (1962).*

Even where a school board seeks to cure past discrimination, the possibility of white flight is not a justification for discrimination against blacks. For example, in *United States* v. *Scotland Neck Board of Education,* 407 U.S. 484, 491 (1972), this Court rejected white flight as a justification for a school board's attempt to maintain some schools as 57% white while other schools would be 89% black. And significantly, the fact that the 57% white schools were still "integrated" made no difference to this Court's decision. See also *Monroe* v. *Board of Commissioners,*

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* Since the number of blacks admitted depends, particularly at Gage Park, on the number of whites admitted, black children are further injured by having their right to an equal educational opportunity subject to the decisions of white parents. *See, e.g., Reitman* v. *Mulkey,* 387 U.S. 369 (1967) (referendum on open housing is unlawful because it makes black rights dependent on choices made by whites); *Hunter* v. *Erickson,* 393 U.S. 385 (1969) (same); *United States* v. *School District 151,* 404 F.2d 1125, 1133 (7th Cir. 1968), *cert. denied,* 402 U.S. 943 (1971) (referendum on location of school is evidence of *de jure* segregation).

391 U.S. 450, 459 (1968).* The Court of Appeals' attempt (at A. 22) to distinguish these cases as involving resistance to desegregation decrees is unpersuasive. If white flight cannot be used as a reason to avoid fully eliminating the effects of past discrimination, it surely cannot serve as a justification for new acts of racial discrimination by a school board.**

Finally, irrespective of its purpose, the discrimination against blacks is not justified because benign purposes are not in fact achieved. The quotas did not stem the exodus of whites from the two schools or stop white flight. To the contrary, from 1975 to 1977, the white enrollment at Gage Park fell from 1034 to 881 and that at Morgan Park fell from 1262 to 1071 (Compare Pl. Ex. 1 with A-40, ¶ 26). Nor did the quotas achieve any integrative purpose. As a result of the quotas, the predetermined racial make-up at each school was of course achieved. But this is not evidence of the program's success, but merely the tautological result of excluding increasing numbers of black children annually until the specified quotas are obtained. And there was no showing that in the absence of the quotas, the two schools would not have achieved a stabilized integrated enrollment like that at Kenwood

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* *Accord, United States* v. *Board of School Commissioners,* 503 F.2d 68, 80 (7th Cir. 1974); *United States* v. *Texas Education Agency,* 532 F.2d 380, 395 (5th Cir.), *vacated on other grounds,* 429 U.S. 990 (1976); *Morgan* v. *Kerrigan,* 530 F.2d 401, 419-22 (1st Cir.), *cert. denied,* 426 U.S. 935 (1976); and *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753 (5th Cir. 1971).

** The Board's rationale for the quotas is also insufficient as a compelling state interest because the Board is not attempting system-wide desegregation, but has limited its objectives to two schools in its generally segregated system. See pp. 25-27 *infra.*

High School, which from 1970-76 remained constant at 26% white (Pl. Exs. 2, 50).

Even more important, the Board has grossly misconceived the underlying philosophy of integration—a philosophy designed not to benefit "schools" but students. If large numbers of black students are deprived of an integrated education, it is of no significance that the Board can list Morgan Park and Gage Park in its statistical reports as racially "stabilized" schools. Even after the Board adopted its modified plan providing bus transportation for excluded black children, the vast majority of those children attended schools which were overwhelmingly segregated. Thus, the Board's allegedly benign theoretical justifications are malignant in practice.

For all these reasons, there is no sufficient justification for the first aspect of discrimination presented in this case—the adoption of racial quotas directed solely at blacks.

4. There is no justification for placing the entire burden on black children.

As noted above (pp. 13-14 *supra*), there is a second aspect of discrimination in this case—the entire burden of achieving integration is placed on black children. Although the Board endeavored to justify the racial quotas themselves, there was no attempt to justify the imposition of burdens exclusively on blacks.

The courts have consistently recognized that the burdens of integration must be spread equitably among the races. *E.g., Arvizu* v. *Waco Independent School District,* 495 F.2d 499, 504-07 (5th Cir. 1974) (and cases there cited) ("[I]t is incumbent upon district courts to insure that the burdens of desegregation are distributed equitably");

Clark v. *Board of Education,* 449 F.2d 493, 499 (8th Cir. 1971), *cert. denied,* 405 U.S. 936 (1972) ("the burden on all students, black and white, should be as equitable as possible"); *Lee* v. *Macon County Board of Education,* 448 F.2d 746, 753-54 (5th Cir. 1971); *Moss* v. *Stamford Board of Education,* 350 F.Supp. 879, 881-82 (D. Conn. 1972); *Brice* v. *Landis,* 314 F.Supp. 974, 976-78 (N.D. Cal. 1969). *See also Hancy* v. *County Board of Education,* 429 F.2d 364, 371-72 (8th Cir. 1970). And fear of "white flight" is not a sufficient justification for imposition of an excessive burden on blacks. *E.g., Lee, supra,* 448 F.2d at 754.

These cases recognize that the imposition of a disproportionate burden on blacks is an independent violation of the Fourteenth Amendment, even where the program is an otherwise desirable effort to eliminate segregation on a system-wide basis. Here, the relative burden on blacks is worse than disproportionate—it is exclusive. *See NAACP* v. *Lansing Board of Education,* 559 F.2d 1042, 1052 (6th Cir.), *cert. denied,* 434 U.S. 997 (1977), *aff'g* 429 F.Supp. 583, 620-21 (W.D. Mich. 1976), which held that a "one-way busing" program which transported blacks but allowed whites to remain in their neighborhood schools, "without a corresponding effort to spread the burdens of integration more equitably through the system, is an act of de jure segregation."

Here the Board is not even endeavoring to eliminate segregation on a system-wide basis. This is not a case where the Board has determined to eliminate segregation in *each* school of its system by specifying a single racial quota applicable to each school which would reflect the district-wide racial make-up. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971). Instead,

the Board has applied its quota to only two of 61 neighborhood high schools, and specified a racial balance which is virtually twice the 25% white enrollment of the system as a whole. (Pl. Ex. 2). To preserve some schools as 50% white in such a setting necessarily means that the remaining schools will have disproportionately high black enrollments. And the remainder of the school system, which is highly segregated (Pl. Ex. 2), is not subject to any mandatory desegregation measures. Schools which are overcrowded and predominantly white* were left as white enclaves in a school system which is predominantly black and Hispanic. Adoption of ceilings on white enrollment at such white schools would have reduced overcrowding and opened places for black students, including those excluded from Morgan Park and Gage Park, and thus promoted integration. Such ceilings could also have resulted in excluded whites attending previously minority schools. But no such ceilings have ever been adopted.

This disparate treatment of predominantly white schools is further evidence of the Board's unequal and inferior treatment of black children. The Board cannot justify its failure to integrate predominantly white schools by narrowly defining its objective of preventing segregation as limited to racially changing neighborhoods. Particularly in a school system which is overall 75% black and Hispanic, a school which is already segregated by being predominantly white is at least as much of a problem as a school which may become predominantly black if racial change continues. In each case, the integrative goal is

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* The schools, many of which are close to Morgan Park and Gage Park, include Kelly (4200 South, 2800 West) (78.1% white in 1976), Kennedy (5600 South, 6300 West) (89% white), Bogan (7900 South, 3900 West) (97.4% white), Hubbard (6200 South, 3800 West) (93.4% white), and Washington (11400 South, 3500 East) (93.3% white) (Pl. Ex. 49 and sources there cited).

the same, and it is unconstitutional to adopt quotas in one case which disadvantage blacks, but refuse to adopt quotas or other measures disadvantaging whites. *McLaughlin* v. *Florida*, 379 U.S. 184, 193-94 (1964) (where there are general evils to be corrected, the choice of piecemeal solutions may not be made on racial grounds).

Indeed, the selective imposition of quotas disadvantaging blacks to prevent racial change will have pernicious effects in Chicago, as it would in other cities with neighborhood school systems and changing neighborhoods. Schools which are predominantly white or predominantly black will be left as is, but a ceiling on black enrollments will be imposed for schools in changing neighborhoods. Such a pattern suggests a desire to preserve schools for whites, rather than achieve integration for all children. Even more important, such selective quotas will deter black efforts to migrate from the inner city ghettos to better neighborhoods with better schools. A black family's incentive to move to an integrated neighborhood will inevitably be diminished by the recognition that its children will be subject to the burdens of a school quota wherever white flight causes white enrollments to drop below the quota level. In the long run, such selective quotas may inhibit integration. And in any case, such quotas are unfair to black parents who move into a neighborhood because of its schools, and then have their children excluded on account of race.* A school board may appropriately

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* As the Court held in *Lawlor* v. *Board of Education*, 458 F.2d 660, 662 (7th Cir. 1972), *cert. denied*, 413 U.S. 921 (1973), in refusing to sanction a ceiling on black enrollments designed to prevent white flight:

> "Furthermore, the declaration sought with respect to limiting 'black students' to a 10-25% range within the O'Toole area schools would deny equal protection of the law to the black people desiring to move into the area and to their children desiring to attend the O'Toole School."

decide to impose such burdens on an equitable basis in order to achieve a *bona fide* desegregation plan. But to impose such burdens only on blacks is an equal protection violation, particularly where the Board's objectives are so selective and their benefits so questionable.

5. The evidence refutes the Board's assertion of a benign motive.

The Court of Appeals did not apply strict scrutiny to the Board's imposition of the entire burden on blacks, but instead deferred to "the discretion of local school authorities." (A. 27)* As the facts of this case demonstrate, deference to local authorities will not fully protect the Constitutional rights of blacks. In the absence of a rule of law requiring strict scrutiny and a compelling state interest justifying all aspects of an explicit racial classifica-

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* The Court of Appeals' discussion was fraught with factual and legal error. For example, it noted that "white students . . . were precluded from transferring to another school until the quota for white students had been exceeded." (A. 26). In fact, under the Board's permissive transfer program (Pl. Ex. 9), both white and black children in each school could attend any underutilized school in the city. The Court of Appeals further noted that whites would be excluded if their quota was exceeded (A. 26). This possibility is wholly theoretical; in fact, no white was ever excluded, and the quota levels for whites were set at a level higher than that at which whites were expected to attend. And in any case, a racial classification is not rendered legitimate because it might also be applied to whites. *McLaughlin* v. *Florida,* 379 U.S. 184, 192-94 (1964), *overruling Pace* v. *Alabama,* 106 U.S. 583 (1883); *Loving* v. *Virginia,* 388 U.S. 1, 10-11 (1967) (same). The Court of Appeals concludes by noting that more blacks than whites were admitted to each school (A. 26 to A. 27), but this point is legally irrelevant. The Constitutional deprivation lies in the exclusion of an individual from the school, and only blacks were ever excluded.

tion—the reason for the program, the basis if any for restricting the scope of the problem to be solved, the effects of the program, and the specific reasons for not selecting less discriminatory alternatives—there can be no assurance that a political majority is not discriminating against a minority under the banner of a benign motive. And this is particularly true where, as here, the purported benign motive of preventing segregation concededly has its origins in the racial prejudice underlying the white flight phenomenon.

Indeed, the Board's depiction of its program as a benign effort to promote integration is an exercise in creative euphemism. The evidence scarcely suggests a solicitude for the black community. On the contrary, the quotas were established over the opposition of the black community's elected representatives. (Pl. Ex. 74 at 40-42, 44-47). When the quota plans were initially adopted, black children were relegated to "underutilized" schools via public transportation. (A. 39 to A. 40, ¶ 24), and in the first year of the plan at Gage Park, black students were actually required to pay their own carefare. (Pl. Ex. 3) (J.A. 24). Virtually all the excluded children attended segregated schools, and not a single black child attended any of the "underutilized" schools which had significant white enrollments. (A. 42 to A. 44, ¶¶ 30-32). The Board, however, did not even investigate whether excluded students were obtaining an integrated education until plaintiffs served their Interrogatories (R.16, ¶ 1(d) at 2; R.25, Ex. 2). The evidence thus demonstrates that the intended beneficiaries of the racial quotas were whites, and not blacks.

In fact, the clearest evidence of the absence of benign motive is the Board's rejection of two less discriminatory alternatives. (Doc. Incorp. by Order, R.71, Letters of July 22, 1977 and August 3, 1977). Plaintiffs proposed

that Morgan Park (11200 South and 1700 West) be paired with Washington (11400 South, 3500 East) which in 1976 was 93.2% white. Using all facilities then available at those schools at 105% of capacity (the benchmark capacity figure for the Board's designation of alternative schools) would have provided an integrated education for 320 of the 390 black students excluded from Morgan Park. The Board, however, rejected the plan (*id.*, Letter of August 3, 1977, at 7) in favor of bus transportation to far more distant white schools, for the sole, scarcely compelling reason that plaintiffs' pairing plan would require continued use of mobile units (which units are widely used throughout the Chicago public school system). (See, for example, Pl. Exs. 14, 15).

Even more striking is the Board's rejection of a second plan, proposed by plaintiffs, involving Gage Park (5600 South and 2600 West) and Curie High School (4900 South and 4000 West), less than 2 miles away (Pl. Ex. 12). Plaintiffs suggested that the two schools be paired or, in the alternative, that Curie be utilized to 105% of capacity in order to accommodate black children excluded from Gage Park. At the time, Curie was at 87.7% of capacity and about 76% white, and thus could have accepted hundreds of black students without disturbing the "racial balance" allegedly sought to be maintained by the Board. Nevertheless, the Board rejected plaintiffs' proposal that Curie be used to foster integration, for the sole reason that the predominately white community in the Curie area would strenuously oppose the influx of black students. (Tr., August 5, 1977, J.A. 35-37). As defendants' counsel, Mr. Murray, stated (J.A. 35-36):

> MR. MURRAY: I have to object to that. We considered that. We have added, the plan adds 100 students to Curie High School. I think anybody who knows the city at all, and has any—
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> • • • •

THE COURT: You will be at something less than 90 percent of capacity.

MR. MURRAY: Yes. We believe that is educationally sound, and any more students added to Curie would be educationally disruptive of the whole program.

THE COURT: Why?

MR. MURRAY: Because a large influx of minority students, that is Marquette Park—

THE COURT: I know where it is.

MR. MURRAY: This is an area where the situation this summer is especially highly volatile.

In our best judgment no more than 100 students should be added to Curie.

As the foregoing colloquy demonstrates, the only reason the Board failed to more equitably distribute the burdens of integration between black and white students, at least insofar as Curie High School is concerned, was its greater solicitude for the prejudices of whites in Marquette Park than for the educational opportunity of black children excluded from Morgan Park and Gage Park. These facts not only emphasize the impropriety of the Board's imposition of burdens exclusively on blacks; they also undermine the Board's protestation of a benign motive for the quotas themselves. When all the facts are analyzed—the Board's initial relegation of excluded black children to underutilized schools via public transportation; its failure to investigate whether black children were obtaining an integrated education; its constant refusal to adopt mandatory measures inconveniencing whites in the name of integration; and its refusal to adopt a pairing alternative—all suggest that the Board was not concerned with providing an integrated education for black children. Rather, it sought to preserve the schools for the white community and,

perhaps even more important, to maintain Morgan Park and Gage Park as buffer zones between the black inner city and the predominantly white enclaves further to the west.

Finally, although the evidence refutes the existence of benign motive, it is not necessary for this Court to find that the Board in fact had an invidious purpose in adopting the quotas. *See University of California Regents* v. *Bakke,* 438 U.S. 265, 289 n.27 (1978) (Powell, J.). Rather, the point is that because the Board adopted a racial classification adversely affecting blacks, it had the burden of proving a benign purpose and a compelling justification. And the evidence in this case, which is entirely documentary, does not meet this burden. There is grave doubt as to both the need for the quotas, and their efficacy in achieving integration.* There was no sound explanation

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* Although the Board relied on a "white flight" theory, it did not present any experts to testify that such a theory was either valid or in any way applicable to Morgan Park and Gage Park. In fact, that theory is subject to substantial uncertainty. In *Morgan* v. *Kerrigan,* 530 F.2d 401, 420-21, n. 29 (1st Cir. 1976) the Court extensively recounted the conflicting sociological studies regarding white flight, and concluded that the white flight issue "is a matter of heated debate among experts in sociology, and a firm professional consensus has not yet emerged." *Id.* at 421, n. 29. And the *Morgan* court admitted that it lacked the expertise to resolve the question. Even where white flight has been verified, it occurs when black racial concentrations are far less than those allowed under the quota plan. *See Armstrong* v. *Brennan,* 539 F.2d 625, 629 (7th Cir. 1976), *vacated on other grounds,* 433 U.S. 672 (1977) ("Once blacks comprise about 30 percent of the population of a neighborhood or a school, 'white flight' generally begins, and whites leave in large numbers. The rate varies but the process is seldom reversed.") Thus, at best, the Morgan Park and Gage Park quotas are "too little, too late," and, as hindsight shows, unlikely to prove effective in preventing declines in white enrollment.

of either the narrow scope of the Board's purportedly benign program or why its objectives could not be achieved by less discriminatory alternatives. There is considerable inconsistency and irrationality in the quota levels selected and other aspects of the program.* And perhaps most important, there is no compelling evidence that the quotas, while portrayed as benign, were not actually intended to discriminate against blacks in order to benefit the white community. To uphold a classification discriminating against blacks on such a flimsy Record would be an invitation to further anti-black discrimination.

In short, the Board seeks to sanction explicit racial quotas disadvantaging blacks whenever the government invokes the talisman of integrative purpose. Such an approach falls far short of the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), which is necessary to vindicate the purpose of the equal protection clause to protect politically disadvantaged groups. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53 n.4 (1938). And this strict scrutiny is most critical at the very point that the Court of Appeals (A. 27) was most deferential to the Chicago Board—in the choice of less discriminatory alternatives. By such deference, the Court of Appeals eliminated the core of the equal protection guarantee—the assurance that blacks will not be singled out to suffer deprivations or be denied benefits while whites are afforded preferential treatment.

The acid test is not whether a state's motive for a racial classification is laudable, but whether the state is willing to achieve its allegedly benign purposes without

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* For example, there is no explanation of why a 58%-42% minority-to-white ratio is deemed necessary to prevent white flight at Gage Park, while a 50%-50% ratio is mandated at Morgan Park. Other inconsistencies and failures of proof by the Board are set forth in the Statement of Facts. See pp. 8-9 *supra.*

inflicting burdens on blacks that it would refuse to impose on whites. All the evidence in this case suggests that the Chicago Board will not adopt any mandatory measures involving white children in the name of integration. By contrast, the Board adopted the quotas disadvantaging blacks over the protests of the black community, and without any concern—until forced to modify its plan by this litigation—for the excluded black child's opportunity to attend an integrated school. This disparate treatment of whites and blacks is the antithesis of equal protection. It would be a bitter irony if the guarantee of integration, which this Court extended to minorities in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), as a promise of equality, became a justification for further discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeal should be reversed, and this case should be remanded for entry of an injunction against the quota plans and such further proceedings as may be appropriate.

Respectfully submitted,

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No. 79-1356

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

KATHY SUE JOHNSON, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY
OF CHICAGO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KATHY SUE JOHNSON, ET AL., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KATHY SUE JOHNSON, ET AL.

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No. 79-1356

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

KATHY SUE JOHNSON, et al.,
Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY
OF CHICAGO, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS KATHY SUE JOHNSON, ET AL.

This motion of the Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Petitioners Kathy Sue Johnson, *et al.,* have consented to the filing of this brief; however, despite numerous attempts to do so, amicus has been unable to contact counsel for respondents and consent of respondents to file this brief is, therefore, deemed refused. This consent has been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Board has authorized the filing of this brief.

Pacific Legal Foundation believes that this case is of great importance to all citizens of the United States. It raises questions of the permissibility of excluding students of a particular race from their integrated neighborhood school to maintain a particular racial balance in that school. Further, it questions the permissibility of classifying students according to race in a nonremedial context. In essence, the case raises the question of the rights of children, the pawns who, too often, are shuttled to and fro in order that mathematical formulae be fulfilled.

Because of the national significance of the case, Pacific Legal Foundation feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own localized interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus curiae is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Johnson v. Board of Education of*

the City of Chicago is reported at 604 F.2d 504 (7th Cir. 1979).

STATEMENT OF THE CASE

At issue in this case is the constitutionality of the Student Racial Stabilization Quota Plan (Racial Quota Plan) that was instituted in two public high schools, Morgan Park and Gage Park, in the City of Chicago. The Racial Quota Plan, which excludes from attendance at the two high schools a significant percentage of the black and hispanic students who live within the geographic attendance area served by the schools, was enacted by the school board in response to changes in the racial mix of the residential neighborhoods within the attendance area. Throughout the operation of the Racial Quota Plan, no white student was ever excluded from either of the schools, whether or not the students lived within the geographic attendance area served by the two schools.

The black and hispanic students who were excluded from Gage Park and Morgan Park High Schools were allowed to transfer to any one of eighteen high schools in the district with an attendance level below the district wide average of 101.3% of capacity. Only six of these "under-utilized" schools had significant white enrollments, the closest of which was 11.4 miles from Gage Park and 18.15 miles from Morgan Park. Under the original Racial Quota Plan, the school board provided the excluded black and hispanic students with "carfare" to travel to another integrated school which required:

1. riding a bus to the Dan Ryan rapid transit line;

2. riding the Dan Ryan line to either the Howard or Ravenswood lines; and

3. transfer to another bus to get to the school.

The board later modified the Racial Quota Plan to provide free bus transportation to the alternate schools. Even with this modification, however, the vast majority of the excluded black and hispanic students ultimately attended alternate schools with enrollments in excess of 99% minority students.

SUMMARY OF ARGUMENT

1. The use of racial quotas for whatever purpose impacts on the Equal Protection Clause of the Fourteenth Amendment and thus requires the state: to demonstrate a compelling governmental interest; to prove that the quota is precisely tailored to serve that interest; and to prove the absence of a less drastic alternative.

2. There is no compelling *governmental* interest in maintaining an integrated student body where the racial mix is being altered by population shifts and no governmental action is implicated.

3. The fact that the students excluded from their integrated neighborhood school by the Racial Quota Plan ended up attending segregated schools demonstrates that the interest advanced is not actually served by the quota.

ARGUMENT

I

ABSENT A COMPELLING STATE INTEREST, THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS RACIAL CLASSIFICATIONS

The Racial Quota Plan adopted by the Board of Education for Gage Park and Morgan Park High Schools classifies the students solely on the basis of their race. The Racial Quota Plan is not a remedial measure to cure the effects of state imposed segregation. Rather, the Racial Quota Plan is a program that the school board adopted on its own initiative to maintain a specified racial balance in the two schools.

This Court has consistently held racial classifications that disadvantage "discrete and insular minorities" to be inherently suspect. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Hirabayashi v. United States,* 320 U.S. 81, 100 (1943). Such classifications are to be subjected to "strict scrutiny" (*Korematsu,* 323 U.S. at 216) and are valid only if use of the classification furthers a compelling state interest in a manner that is the least destructive to the rights of the class of persons disadvantaged (*Regents of the University of California v. Bakke,* 438 U.S. 265, 305 (opinion of Powell, J.), 357 (opinion of Brennan, White, Marshall, and Blackmun, JJ.) (1978). This Racial Quota Plan that excludes significant numbers of black and hispanic students from their neighborhood schools imposed by the Board of Education of the City of Chicago utterly fails to meet this test of strict scrutiny.

A. Respondents Have Failed to Advance a Governmental Interest

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), this Court stated, in dicta:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example. that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. . . ." *Id.* at 16.

Amicus curiae Pacific Legal Foundation would suggest, however, that this conclusion be reexamined in light of the Equal Protection Clause of the Fourteenth Amendment. Amicus notes that this Court has, on prior occasions, struck down laws containing racial classifications even though the law applied equally to all races. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967). A policy adopted by a school board to maintain a specified racial balance in the student population will necessarily classify students on the basis of their race and, in instances such as the Racial Quota Plan here at issue, may impose the entire burden of maintaining the balance on one particular race.

While amicus realizes there is no fundamental right to attend a particular public school, we wish to emphasize that there are interests of the student and his or her parents that should be considered before excluding that student from the neighborhood school. Many factors contribute to the educational development of the nation's youth. Of these,

the school plant and its teaching staff are only one element. Other factors which must be given due consideration are the importance of the parents' place in education, parental involvement in the schools' parent-teacher programs, opportunities for extracurricular activities, adequate nutrition, and adequate exercise and rest. These factors, to a large part, are best served by a neighborhood school.

Consider, for example, the problems a parent might have in attending a Parent-Teacher Association meeting at his child's school which is located many miles from his home. In an area such as Los Angeles, where some children are bused to schools 20 miles from home, this important part of child educational development may be totally lacking. Sending children to school many miles from their homes also places an extra burden upon parents who would like to assist in daytime school activities. Parents of modest income may be altogether precluded from helping in the classroom simply because they cannot afford the costs of transportation. Taking children out of their neighborhood schools may also diminish their opportunity to participate in extracurricular activities. Where athletics, band, or other such activities are conducted outside of regular school hours, the child who has to ride the bus may be precluded from participating. These interests of the students must be weighed against the mere desire of the school board to achieve or maintain a racial balance.

The question of whether a school board has a legitimate interest in maintaining a prescribed racial balance becomes even more perplexing when considered against the factual background of this case. Gage Park and Morgan Park High Schools were racially integrated prior to the imposition

of the Racial Quota Plan. The racial quotas were imposed when the school board perceived a shift in the racial mix of the residential neighborhoods within the geographic attendance areas of the two schools. This Court has previviously held that:

> "It does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann,* 402 U.S. at 31-32 (brackets in original).

The school board in this case is unduly burdening the students by requiring them to suffer a crosstown bus trip to reap the benefits of an integrated school—benefits already available in their neighborhood school.

Finally, amicus questions the governmental interest in a racial quota plan that disadvantages a class of persons that the school desegregation cases sought to protect. *See Brown v. Board of Education of Topeka,* 347 U.S. 483, 493-94 (1954).

B. Respondents Have Failed to Show That Any Presumed Governmental Interest Is Actually Advanced By the Use of Racial Classifications

Even assuming arguendo that the school board has put forward a governmental interest considered to be compelling, this alone is insufficient to support a state action disadvantaging a class of persons solely on account of their

race. The school board must also demonstrate that the use of the racial classifications actually furthers or serves that compelling interest. *Bakke,* 438 U.S. at 305 (opinion of Powell, J.), 357 (opinion of Brennan, White, Marshall, and Blackmun, JJ.).

If this Court finds that the school board has put forward a compelling governmental interest, that interest must be a racially balanced student population in general—not merely a prescribed racial mix at only two of the 51 high schools in the district. The proffered interest clearly is not served by the Racial Quota Plan.

Further, the interest is not served if the black and hispanic students excluded from the two schools are denied the benefits of that governmental interest. The Court of Appeals for the Seventh Circuit held that the free transfer program established by the school board for the excluded black and hispanic students provided those students with a "viable opportunity" to attend an alternate integrated school. *Johnson v. Board of Education of the City of Chicago,* 604 F.2d at 518. Amicus curiae believes, however, that this conclusion was erroneous. The vast majority of the black and hispanic students excluded from their neighborhood schools ended up attending high schools with a 99% minority student population. *Id.* at 513.

It appears that the Court of Appeals overlooked the decisions of this Court that hold "free transfer" programs to be an inadequate remedy for students who have been denied benefits granted other students in the school district solely on account of the color of their skin. *See e.g., Monroe v. Board of Commissioners,* 391 U.S. 450, 457-59 (1968);

Raney v. Board of Education, 391 U.S. 443, 446 (1968); *Green v. School Board of New Kent County*, 391 U.S. 430, 441 (1968).

CONCLUSION

In concluding that the Racial Quota Plan here in question was constitutionally permissible, the Court of Appeals stated:

> "Moreover, we regard the mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and effectively achieves that objective, to be ordinarily a matter within the discretion of the local school authorities." *Johnson*, 604 F.2d at 519.

The Court of Appeals has missed the point both of the Racial Quota Plan and the decision in *Brown*. The Racial Quota Plan was not imposed as a remedial measure to eliminate the vestiges of a dual school system. In fact, both Gage Park and Morgan Park High Schools were fully integrated before the plan was implemented.

The Racial Quota Plan here at issue does not represent the implementation of the promise of *Brown*. Rather, exclusion of black and hispanic students from their integrated neighborhood school and relegating them, in fact, to schools with a minority student population in excess of 99% is a perversion of both the Equal Protection Clause and the decision in *Brown*. This case is representative of the fallacy of "benign racism" and quotas in general. The granting or withholding of rights and privileges solely on the basis of

an immutable characteristic such as skin color or gender, regardless of the purpose, can have no place in a society ruled by a constitution that purports to guarantee equal treatment to all citizens.

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August, 1980

No. 79-1356

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OCTOBER TERM, 1979

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BOARD OF EDUCATION OF THE CITY OF CHICAGO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the Chicago Board of Education may constitutionally impose racial quotas on enrollment at two of its integrated high schools where (a) the quota plans lead to the exclusion and segregation of a substantial number of black students and are therefore presumptively invalid under the Equal Protection Clause, and (b) the Board failed to show that its asserted objectives of preventing segregation and overcrowding were its actual objectives and that these objectives could not be achieved by less discriminatory alternatives.

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INTEREST OF THE UNITED STATES

The United States has substantial enforcement responsibilities with respect to school desegregation under Titles IV, VI and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d and 2000h-2, and under the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.* In addition, the United States has a policy of encouraging school boards voluntarily to eliminate minority group isolation and segregation among students and faculty. 20 U.S.C. 1716, (Supp. II) 3191-3207. The United States has participated either as a party or as amicus curiae in virtually all of the Court's school desegregation cases.

STATEMENT

This case arises out of two suits filed by petitioners on March 15, 1976 (and later consolidated), challenging racial enrollment quotas ("Student Racial Stabilization Quota Plans") imposed by the Chicago Board of Education in 1975 and 1976 at two of its integrated high schools—Gage Park High School (Gage Park) and Morgan Park High School (Morgan Park) (Pet. App. A2).[1] The stated purposes of the quotas were to reduce overcrowding and to prevent the two schools from becoming increasingly black (Pet. App. A36; R. 33 at 3-6). The quota levels for the admission of black students were deliberately set at a lower level than the number of blacks who would have enrolled in the absence of the plans (*ibid.*). As a result of the quotas, between 1975 and 1977 approximately 1630 black students were denied the opportunity, available to all

[1] "Pet. App." refers to the appendix to the petition for certiorari; "Op. Cert." refers to respondents' brief opposing certiorari; "A." refers to the joint appendix to the briefs in this Court; "R." refers to the consecutively paginated record filed with the court of appeals. References to "Pltf. Ex." and "Def. Ex." are to exhibits submitted by petitioners and respondents respectively. Those exhibits were received into evidence at R. 47 at 3, R. 50 at 1-2, and R. 71, and they are described in lists attached to orders at R. 47 and R. 50, and in the order at R. 71. Unless otherwise stated, cited exhibits are from the list attached at R. 47. Objections initially made (R. 47) to certain exhibits cited in this brief were later withdrawn (R. 50 at 2). "Stip." references are to the numbered paragraphs in the Statement of Uncontested Facts attached to the Final Pretrial Order (R. 47).

other high school students in Chicago, to attend their respective "neighborhood" high schools (Pet. App. A14, A42–A45, A47; Stips. 17, 27–29). The majority of the students excluded under the quotas attended virtually all-minority schools instead (Pet. App. A42–A44, A47).

A. *General Background*

The Chicago public school system is organized into 27 geographic districts, with student enrollments ranging from 9,284 to 31,508. In 1976, when these suits were filed, it operated 669 schools and enrolled 524,221 students of whom 24.9% were white, 59.4% black, 14.1% Hispanic and 1.6% other (Pltf. Ex. 2.).

The Chicago public schools exhibit a high degree of racial imbalance. During the last 15 years, the Chicago Board of Education ("the Board") has been urged by both the state and the federal governments to eliminate or reduce segregation.[2] Despite these pressures, in 1976, 79% of the elementary schools and 67% of the high schools remained at least 85% minority or 85% majority.[3]

At the secondary level, the Board operates 75 schools, including general high schools, vocational schools, and technical schools (Pltf. Ex. 2, 13). The 51 general high schools and the 9 "branch" high schools are organized on a neighborhood basis, while the other secondary schools generally admit students from throughout the city (See Pet. 4; Def. Ex. 1; R. 13 at 10–11). The white student enrollment in the general and technical high schools exceeds

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[2] U.S. Commission on Civil Rights, *Desegregation of the Nation's Schools: A Status Report* 35–36 (1979). On April 9, 1979, the Department of Health, Education and Welfare (now the Department of Education) notified the Board that it was ineligible for funding under the Emergency School Assistance Act (20 U.S.C. (Supp. II) 3191–3207) and asked the Board to explain why it was not also in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. On April 21, 1980, the United States Department of Justice gave notice to the Board of its intent to file suit under Titles IV and VI of the Civil Rights Act of 1964 unless voluntary compliance was forthcoming. The Department of Justice is currently engaged in pre-suit negotiations with the Board to obtain voluntary compliance with these statutes.

[3] See Pltf. Ex. 2. Excluded from this calculation, from our subsequent discussion, and from the figures supplied in Appendix A and Appendix B to this brief are 10 special schools such as the Spalding School for the Physically Handicapped and the Industrial Skill Center.

the systemwide average of 24.9%, while the vocational schools are disproportionately black.[4]

A substantial number of the high schools operate in excess of their "permanent capacity" (App. A, *infra*).[5] Many of those "overutilized" schools, defined by the Board as schools operating in excess of the average utilization level of the schools (see Pet. App. A44), use mobile classrooms to alleviate overcrowding.[6]

B. *The "Student Racial Stabilization Quota Plans"*

Gage Park (No. 34) is located on the southwest side of Chicago in District 12, which is 75% white (Pltf. Ex. 2; see App. B, *infra*).[7] It is generally positioned between all-minority schools on the east and predominantly white schools on the north and west. In 1975, Gage Park was approximately 41% white and 59% minority, and was operating at 106% of its capacity, with a total enrollment of 2,441 (Pet. App. A34–A35).

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[4] Of the students attending general and technical high schools, 31.4% are white, while 9.3% of the students enrolled in vocational schools are white (Pltf. Ex. 2).

[5] Permanent capacity is determined by the Board under a formula that takes into account the number of instructional areas (such as classrooms, laboratories, shops and gymnasiums), the average class size, the total number of class periods in a regular school day, and "the percent of use of space." The formula excludes "temporary facilities," which include mobile classrooms and branch schools (Pltf. Ex. 16).

Appendix A ("App. A") to this brief lists enrollment and utilization figures for 1975 and 1976 taken from exhibits in the record. As shown there, the utilization levels in the high schools ranged from 49.7% to 157.1% in 1975 (Pltf. Ex. 14). The average utilization level for the general high schools was 101.3% of permanent capacity (Pet. App. A44). Twenty-two of the 51 general high schools exceeded that level in 1975, and 29 exceeded that level in 1976 (*ibid.*). In 1975, five of the ten vocational schools exceeded 105.2%, the average utilization level for vocational schools. In 1976, six vocational schools exceeded the average level of 106.3% (Pltf. Ex. 14, 15).

[6] In 1975, 107 mobile classrooms were in use at the secondary level, distributed among 14 schools. In 1976, 108 units were used at 16 schools (Pltf. Ex. 14, 15).

[7] "App. B" refers to the map reproduced as an appendix to this brief showing the location and racial composition of the Chicago high schools in each district in 1976. Schools shown there are identified by number, and we have placed these identifying numbers in parentheses following school names cited in the brief to facilitate reference to the map.

The Gage Park quota plan, which went into effect in September 1975, established a ceiling on enrollment of 2,800 students and placed a school-wide racial quota on admissions, providing that students be admitted in numbers that would maintain an enrollment that was 48% black, 42% white, 8% Hispanic and 2% "principal's option" (Pet. App. A35).

The three other high schools in District 12—Curie (No. 33), Kelly (No. 36), and Kennedy (No. 39)—have predominantly white enrollments.[8] Two additional high schools with virtually all-white enrollments—Bogan (No. 43) and Hubbard (No. 45)—are located in District 15, immediately south of Gage Park.[9] With the exception of Curie, in 1976 all of these schools had utilization levels exceeding that of Gage Park.[10] Curie was underutilized, operating at 87.7% of its permanent capacity (App. A, *infra*).

Morgan Park (No. 53) is located on the far south side of Chicago in District 18, which is 21.3% white (see App. B, *infra*). In 1976, 38% of the students enrolled at Morgan Park were white and 62% were black, and the school was operating at 128.6% of its permanent capacity (Pet. App. A34).[11] On March 10, 1976, the Board adopted a racial quota plan for Morgan Park. The Morgan Park plan limited the enrollment of incoming ninth graders to 700 students, to be divided approximately 50% white and 50% black (Pet. App. A35–A36).[12]

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[8] In 1976, Curie was 75.7% white, Kelly was 78.1% white and Kennedy was 89% white (Pltf. Ex. 2; App. B, *infra*).

[9] Bogan was 97.4% white in 1976 and Hubbard was 93.4% white (Pltf. Ex. 2; App. B, *infra*).

[10] Kelly (141.5%); Kennedy (110.4%); Bogan (126.6%); and Hubbard (110.1%) (Pet. App. A44); App. A, *infra*). Kelly used two branch schools to reduce its utilization level to 101.0%. Kennedy used five mobile classrooms, which reduced its utilization level to 102.3%, and Bogan used four mobiles, for 118.7% utilization.

[11] Including the four mobile classrooms at Morgan Park and its branch school, Clissold, the utilization level in January 1976 was 108% (Pltf. Ex. 14).

[12] One other public high school in Chicago limits the enrollment of incoming students on the basis of race—Whitney M. Young, Jr. (Young) (No. 25), a magnet school emphasizing science, medical arts and performing arts, which is open to any high school student in the city so long as the prescribed racial balance (40% white, 40% black,

Until June 1977, the Board operated a separate branch for some Morgan Park ninth graders at Clissold, a predominantly white elementary school approximately six blocks west of Morgan Park (R. 12 at 3–4a). The Clissold branch historically has been all-white, while the ninth grade in the main building has been heavily black.[13] The quota applied to all incoming ninth graders as a group, without distinguishing between the Clissold branch (94.8% white in 1976) and the main building (68% black) (R. 12 at 4a).

Although the other high school in District 18, Julian (No. 52), is virtually all-black, there are several predominantly white schools in the vicinity of Morgan Park, including Bogan, Hubbard, and Washington (No. 51) (App. B, *infra*). Washington also was overutilized.[14]

According to the Board, the enrollment quotas were necessary to relieve overcrowding and to prevent the two high schools from becoming increasingly black (Pet. App. A36). During the four years immediately preceding adoption of the plans, the black enrollments at both schools had increased.[15] While black enrollments were rising, however, the racial composition of students attending both public and non-public schools in the two attendance areas in 1976 remained in excess of 50% white (Pet. App. A34–A35).

C. *Community Meetings Preceding the Plans*

Before adopting the plans, designated Board committees held public meetings with community members in Gage Park and Morgan Park (R. 16 at 2–5). While the parents

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10% Hispanic, 5% other and 5% principal's option) is maintained (R. 8 at 21).

[13] In the years 1972 through 1975, white enrollment at the Clissold branch ranged from 95.2% to 98.6%. Ninth grade black enrollment at the main building ranged from 74.6% to 81.8% (R.12 at 4a).

[14] In 1976, Washington was 93.2% white, was operating at 115.8% of its permanent capacity, and used four mobile classrooms to alleviate overcrowding (108.1% overall utilization) (Pltf. Ex. 15).

[15] Between 1972 and 1974, black student enrollment at Gage Park rose from 1,056 to 1,361. Between 1972 and 1975, the total enrollment at Morgan Park increased from 3,092 to 3,423, with black student enrollment increasing from 52.3% to 62.3% and white student enrollment declining from 45.7% to 36.9% (Pet. App. A34–A35).

attending the Gage Park meeting were primarily concerned with alleviating overcrowding at Gage Park (Def. Ex. 35), the parents who attended the two Morgan Park meetings were generally opposed to the enrollment quotas (Pltf. Ex. 74, 75; R. 50 at 2). They questioned the fairness of excluding from Morgan Park black students who, they feared, would then attend segregated rather than integrated schools (Pltf. Ex. 74 at 10, 27–28, 29). Two community members questioned the Board's good faith in proposing the enrollment quotas (*id.* at 44, 46) and suggested that if integration were truly the Board's goal, it would adopt a broad plan "as opposed to trying to take this little corner and use it as the basis on which to start * * *" (*id.* at 46). The chairperson of the Board committee at the Gage Park meeting stated that she saw no alternative means of reducing overcrowding and preserving integrated enrollments (Pltf. Ex. 75 at 33). One Morgan Park parent suggested that students excluded under the plans be assigned to one of the predominantly white high schools on the south side,[16] but the Board staff indicated that the enrollment at these schools exceeded their permanent capacities, excluding mobile classrooms (*id.* at 28, 38–40).

After the meetings, the committees recommended adoption of the plans (A. 24–25). The full Board accepted the committees' recommendations without comment (Def. Ex. 2, 3).

D. *Operation and Impact of the Plans*

Pursuant to the plans, lotteries were conducted each year in preparation for upcoming academic years, beginning in 1975 for Gage Park and 1976 for Morgan Park. Separate lottery lists were made for white, black, and (at Gage Park) Hispanic students[17] from a list of eligible eighth grade students. Students were admitted in the order that their names appeared on the lottery lists until the quota for their race was filled (Pet. App. A37). In each

[16] "I think that if you want integration, then you open up every school on the south side, Bogan and give them the option for Bogan, Washington, Kennedy—open it—the whole Area A, and if you can't do that and everything, forget it, because it is not fair" (Pltf. Ex. 74 at 28 (Mrs. Thomas)).

[17] Morgan Park has no significant Hispanic enrollment (Pet. App. A10).

year, all white students included in the lotteries or subsequently applying for admission were allowed to enroll (Pet. App. A38–A39). Black and Hispanic students denied admission were placed on a "waiting list" and were offered the opportunity to attend Morgan Park or Gage Park if another previously admitted student of the same race elected not to attend (Pet. App. A39). At Gage Park, additional black or Hispanic students were admitted if additional white students elected to attend, so long as the prescribed racial balance was maintained (Pet. App. A39).

A total of 1630 black students were excluded by the lotteries from the two schools between 1975 and 1977: from Gage Park, 416 in 1975, 539 in 1976, and 329 in 1977; from Morgan Park, 193 in 1976 and 157 in 1977 (Pet. App. A42–A45; Stip. 27–29). As the plans were originally implemented, the excluded students were instructed to attend one of 18 "underutilized" (below 101.3% of capacity) general high schools in the City (Pet. App. A39–A40). Excluded students were also allowed to attend one of four vocational and technical schools, all of which exceeded 97% minority and were overutilized.[18] At 11 all-minority high schools (including the four vocational schools), certain numbers of students (ranging from 20 to 100) were guaranteed admission regardless of the effect on capacity; but students were admitted to the remaining underutilized schools only until the schools reached capacity (R. 16 at 12).

Those 18 general high schools were the same schools that were eligible to receive transfer students under the Board's Permissive Transfer Program (PTP), first established in 1963. Under the PTP, every student attending an overutilized high school in the city (which included Gage Park and Morgan Park) had the option of traveling at his or her own expense to one of the underutilized schools, regardless of the impact of the transfer on the racial balance of the sending or receiving school (Pet. App. A39–A40; Def. Ex. 27, at 7). Since receiving general high schools were limited to underutilized ones, excluded stu-

[18] These schools were Chicago Vocational (No. 48) (99.1% black; 108.4% utilization in 1976), Dunbar Vocational (No. 32) (99.5% black; 130.4% utilization), Lindblom Technical (No. 46) (97% black; 116.8% utilization), and Simeon (No. 60) (100% black; 129.6% utilization) (R. 16 at 12) (see App. A and App. B, *infra*).

dents were not permitted to attend Kelly (No. 36), Kennedy (No. 39), Bogan (No. 43), Hubbard (No. 45) and Washington (No. 51)—predominantly white schools on the south side not far from Gage Park and Morgan Park (Pet. App. A44; App. B, *infra*). Neither were they allowed to attend the nearby and underutilized Curie High School (No. 33) under the PTP (App. B, *infra*).

As stipulated by the Board, only six of the 18 alternative schools had significant white enrollments in 1976,[19] and all six were located on the north side of Chicago. The closest (Lakeview) (No. 7) was 11.4 miles from Gage Park and 18.15 miles from Morgan Park (Pet. App. A41). The Board conceded that it had no knowledge of the travel time or travel routes between Morgan Park and Gage Park and these schools when it devised its plans, and referred excluded students to the Chicago Transit Authority for such information (R. 12 at 13). According to the Chicago Transit Authority, travel to one of the white or integrated schools by means of public transportation required (1) taking a bus to the Dan Ryan rapid transit line, (2) transferring from the Dan Ryan to the Howard or Ravenswood rapid transit lines, (3) travel on the Howard or Ravenswood rapid transit lines, and (4) in two instances, an additional bus trip to the school (Pet. App. A41). In 1975, when the Gage Park plan was adopted, the Board refused to reimburse excluded students for their transportation costs, but in 1976 agreed to offer them carfare (Pet. App. A40).

Of the 1,148 black students excluded under the plans in 1975 and 1976, none attended the six northside high schools with significant white enrollments. The vast majority (all but 48) attended segregated schools (85% or more minority) generally located closer to their residences.[20] At least 420 students attended overcrowded

[19] Roosevelt (No. 1) (76% white); Von Steuben (No. 3) (63.2% white); Mather (No. 4) (89.6% white); Sullivan (No. 5) (73.4% white); Lakeview (No. 7) (43.6% white); and Senn (No. 66) (44% white) (Stip. 25; see also Pet. App. A13, A41). Two additional alternative schools had white enrollments exceeding 15%: Kenwood (No. 42) (26.4% white in 1976) and Wells (No. 17) (16.3% white) (Pet. App. A41). Kenwood is 5.23 miles from Gage Park and 8.65 miles from Morgan Park, and Wells is 7.6 miles from Gage Park and 14.25 miles from Morgan Park (Pltf. Ex. 12).

[20] Of the 193 students excluded in 1976 from Morgan Park, 191 attended alternative schools with enrollments over 99% minority. Nearly

minority schools not on the PTP list (see Pet. App. A41-A44; App. A, *infra*).[21] Only 48 students attended schools with white enrollments exceeding 15%; seven of the eight schools which they attended were not on the PTP list and four were overcrowded (Pet. App. A41-A44).[22]

E. *Modification of the Plans*

On June 29, 1977, the scheduled trial date in the district court, the Board informed the court that it was considering modifying the plans, and it waived its right to present testimony. The court then stated that it was prepared to find the plans as originally adopted unconstitutional, but would reserve final ruling pending any modification the Board might wish to present (Pet. App. A45).

In response to the court's suggestion that the plans be modified, petitioners suggested several alternative means of preserving integrated student bodies at Gage Park and Morgan Park, including a broader desegregation plan, in-

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all of the excluded students not attending a technical or vocational high school (110 of 117 students) attended Carver High School (No. 72) (100% black), the closest underutilized school to Morgan Park (Pet. App. A44); see also App. B, *infra*. When the Board committee initially recommended to the full Board that an enrollment quota be imposed at Morgan Park, it designated Carver as the primary receiving school for students excluded under the plan (Pltf. Ex. 4). In its final recommendation the committee stated that students who could not "be accommodated at Morgan Park will be permitted to attend any under-utilized facility in the city" without naming specific receiving schools (Pltf. Ex. 8). Carver High School was one of the 18 underutilized schools later listed as available to excluded students (Pet. App. A41).

Before the enrollment quotas were instituted at Gage Park, some students residing in the Gage Park attendance area had the option of attending either Gage Park or Harper (No. 44) (100% black; 115.5% utilization in 1976) (Def. Ex. 35 at 43-44). See App. B, *infra*. Students excluded by the Gage Park lottery were encouraged by the Gage Park principal to exercise this option (Def. Ex. 22), and a substantial number (200 out of 855 in 1975 and 1976) attended Harper (Pet. App. A42-A43).

[21] Data with respect to 99 of the 416 students excluded from Gage Park in 1975 is unavailable (Pet. App. A42; Stip. 27). Data is also unavailable for students excluded from Morgan Park who attended technical or vocational school (Pet. App. 44; Stip. 29, see note 20, *supra*).

[22] See App. A, App. B, *infra*. Twenty-seven of the 48 students attended Kenwood (26.4% white in 1976), a PTP receiving school. The remaining students were scattered among the seven other schools (Pet. App. A42-A43).

tegration of the predominantly white schools near Morgan Park and Gage Park, and two pairing proposals (Pet. 9; R. 71, Letter of July 22, 1977, at 4–6). The first pairing proposal, involving Morgan Park (No. 53) and Washington (No. 51) (93.2% white in 1976), was rejected by the Board because it would involve the continued use of mobile classrooms (R. 71, Letter of Aug. 3, 1977, at 7). The second proposal was to pair Gage Park (No. 34) with Curie (No. 33) (76% white in 1976), which was operating under its capacity and is within two miles of Gage Park (Pet. 9; R.71, Letter of July 22, at 4–6). See App. B, *infra*. According to the Board's counsel, no more than 100 black students from Gage Park and Morgan Park could be allowed to attend Curie, even though the addition of 100 students would only raise Curie's utilization level to 90%, because "a large influx of minority students" would be "educationally disruptive" in the "highly volatile" area of Marquette Park, where Curie is located (A. 35–36).

Rather than adopt these proposals, the Board expanded from six to ten the number of white or integrated schools offered to students excluded under the quotas and agreed to provide bus transportation to those ten schools. Up to 1,262 spaces were reserved at these schools for Gage Park transfer students and up to 390 spaces were reserved for Morgan Park transfer students (A. 27; Pet. App. A46). Three of the four new schools were located on the north side of Chicago, in the same general area as the original six.[23] The fourth school was Curie, at which the Board reserved a maximum of 50 spaces for students excluded from Gage Park and 50 for those excluded from Morgan Park (Pet. App. A46).

As of October 1977, 102 of the 1,632 black students denied admission to Morgan Park and Gage Park under the plans were participating in the transportation program (Pet App. A47). The Board reported that as of October 1978, 359 students had elected to participate in the transportation program (Pet. App. A14).

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[23]The closest (Lane Tech) (No. 8) was 10.64 miles from Gage Park and 17.48 miles from Morgan Park (Pltf. Ex. 12). The other two were Taft (No. 2) and Schurz (No. 14). See App. B, *infra*.

F. *The lower court opinions*

On December 30, 1977, the district court entered its findings of fact and conclusions of law based on the documentary record (Pet. App. A33–A49). It held that the plans as originally adopted were unconstitutional "in that they did not give excluded students a viable opportunity to attend other integrated schools" but that the constitutional defect was cured by the 1977 modification providing bus transportation (Pet. App. A48).[24] The district court also found that the plans were successful in achieving the Board's dual objectives of relieving overcrowding and promoting integration (Pet. App. A40). It issued a permanent injunction directing the respondents to continue the modified transfer plan (Pet. App. A49).

The court of appeals affirmed (Pet. App. A1–A28). It found that the Board had a compelling interest in preventing *de facto* segregation at Morgan Park and Gage Park High Schools (Pet. App. A22).[25] Without examining the Board's intent, the court characterized the plans as "a good faith effort to stabilize the enrollments at Gage Park and Morgan Park High Schools, and to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans" (Pet. App. A22). The court also held that "local school authorities may legitimately take into account the phenomenon of white flight in formulating voluntary programs designed to achieve integration" (Pet. App. A22). Addressing the means chosen by the Board to implement its objectives, the court deferred to the discretion of the Board, stating (Pet. App. A27): "[T]he mechanics of integration, particularly in the circumstances of voluntary remedial action, where the purpose is obviously to implement the promise of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and effectively achieves that objective, [are] ordinarily a matter within the discretion of local school authorities."

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[24] The district court did not make findings on the length of the bus rides to the white or integrated schools under the modified plans.

[25] Petitioners did not contend that the trend toward higher minority enrollments at Gage Park and Morgan Park was the result of segregative actions of the Board.

SUMMARY OF ARGUMENT

1. At issue in this case are racial enrollment quotas imposed at two integrated high schools in a highly segregated school system, ostensibly for the purposes of promoting integration and reducing overcrowding at the two schools. The quota plans were designed to exclude black students, but not whites, from their integrated neighborhood schools and in fact operated not only to exclude black students but to divert most of the excluded students into all-minority schools. As express racial classifications that exclude and segregate black students, the quotas embody precisely those evils inherent in the dual school systems condemned by this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The traditional deference owed to local school authorities and the permissibility of voluntary race-conscious measures to achieve racial balance in a school district do not relieve the race-conscious segregative practice here from the most exacting form of review. *Brown* is merely an illustration of an established constitutional principle: express racial classifications that discriminate against a historically disadvantaged minority group are presumptively the product of invidious intent, and those defending them bear a heavy burden of justification. Under this strict standard, the responsible governmental entity can rebut the presumption of unconstitutionality only by demonstrating—not merely asserting—that the classifications are necessary to the achievement of a permissible and substantial governmental purpose and that the purpose could not be achieved by any less discriminatory alternative.

2. In this case the Board did not carry its heavy burden of rebutting the presumption. First, it failed to show that its ostensible objectives of promoting integration and avoiding overcrowding were its actual objectives. To the contrary, the record strongly suggests that the Board's intent was invidious: it was concerned merely with stabilizing white enrollment at Gage Park and Morgan Park without disturbing white majorities elsewhere in the school system, and it was responding primarily to the prejudices of whites rather than to concerns about the consignment of black students to all-minority schools. Thus the Board

gave the excluded black students the option of attending nearby schools with heavy black majorities or distant white and integrated schools; and it refused to permit the students to attend nearby white or integrated schools. The transfer options were therefore structured in such a way as to make it foreseeable that most of those students would end up attending nearby virtually all-minority schools. Moreover, Board policies, both express and tacit, were inconsistent with both asserted objectives. For example, the Board expressly authorized the excluded students to attend overutilized vocational and technical schools with virtually all-minority enrollments while maintaining that the reason for barring them from nearby white and integrated schools was that the latter were overutilized. The Board strongly confirmed the presumption of invidious intent when, through its counsel, it rejected a school pairing proposal on the ground that a large influx of minority students would be "disruptive" in a "volatile" predominantly white area.

The Board also failed to show that, even assuming that its asserted objectives were its actual objectives, they could not have been achieved by less discriminatory means. It did not seriously consider alternative plans that would not divert black students from their integrated neighborhood schools into segregated schools and it offered no expert testimony justifying the means it chose. Included among the possible plans ignored by the Board are permissible race-conscious measures, such as school pairing, redistricting, magnet schools, and more comprehensive desegregation plans. Such plans would result in a net decrease in segregation in the school system generally without diverting black students from integrated schools to segregated schools and would more equitably distribute the burdens among students of all races.

Rather than attempt to demonstrate that it gave adequate consideration to alternative means of achieving its goals, the Board simply asserts that racial quotas are a necessary means of preventing "white flight." But just as the possibility of white flight cannot justify a failure to move towards eliminating *de jure* segregation (*Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968)), so adverse public reaction to increasing minority enrollments cannot justify a plan that discriminates against minority

students by excluding them from their neighborhood schools and segregating them in other schools, while allowing white students to attend their neighborhood schools even when those schools enroll heavy white majorities.

ARGUMENT

THE ENROLLMENT QUOTAS ARE UNCONSTITUTIONAL BECAUSE, AS EXPRESS RACIAL QUOTAS THAT EXCLUDE BLACK STUDENTS FROM INTEGRATED SCHOOLS, THEY ARE PRESUMPTIVELY INVALID UNDER THE EQUAL PROTECTION CLAUSE AND THE BOARD HAS NOT REBUTTED THE PRESUMPTION

A. *Applicable Principles*

This case concerns racial enrollment quotas imposed at two integrated public high schools that were (1) designed to limit black student enrollment to numbers lower than the numbers who could be expected to apply and (2) in fact operated to exclude substantial numbers of black students from those schools and divert most of them to schools that were virtually all-minority.

These practices—which substantially deviated from normal Board policy—were purportedly adopted to promote racial integration and reduce overcrowding at Gage Park and Morgan Park high schools. In our view the traditional deference owed to local school authorities (see *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973)) and general approval of voluntary race-conscious measures to achieve racial balance in a school district (see *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971)) do not relieve the race-conscious segregative practice here from the searching scrutiny which normally attends race-conscious action that prefers one racial or ethnic group over another. *Fullilove* v. *Klutznick*, No. 78-1007 (July 2, 1980), slip op. 20-21, 4 (opinion of Burger, C.J.); *id.*, slip op. 2 (opinion of Marshall, J.); see generally, *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978). Indeed, as

measures taken by school authorities that purposefully exclude minority students from particular integrated schools, and result, in most cases, in their enrollment in virtually all-minority schools, the quotas fall within the prohibition of *Brown* v. *Board of Education*, 347 U.S. 483 (1954) ("*Brown I*") against purposeful segregation of students in a public school system; for measures that "are intended to, and [do] in fact, discriminate against minority pupils" constitute invidious discrimination whether they are imposed by state law or merely devised by school authorities. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 406, 420 (1977). Accord, *Keyes* v. *School District No. 1*, 413 U.S. 189, 201–203 (1973).

The school segregation laws invalidated in *Brown* are classic examples of express racial classifications that prefer a majority racial group over a less powerful minority and that therefore require the most exacting form of review. See, *e.g.*, *Hunter* v. *Erickson*, 393 U.S. 385, 391–392 (1969); *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967); *Goss* v. *Board of Education*, 373 U.S. 683 (1963). Put another way, explicit racial classifications that thus discriminate against members of a group who are "saddled with such disabilities or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" (*San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973)) are "constitutionally suspect" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954)) and carry a presumption of invidious or discriminatory purpose (*Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 272 (1979)).[26] Ac-

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[26] Invidious classifications are those by which one group is subjected to disparate treatment based not on rational, neutral considerations but on bias, prejudice, or antipathy toward the classified group. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 593 n.40 (1979). Invidious intent "implies more than intent as volition or intent as awareness of consequences * * *. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of' its adverse effects upon an identifiable group." *Ibid.*

"Certain classifications * * * in themselves supply a reason to infer antipathy. Race is the paradigm." *Personnel Administrator of Massachusetts* v. *Feeny*, *supra*, 442 U.S. at 272. Thus, with respect to the standard for proving discriminatory purpose, express racial classifications are unlike classifications that may have a disproportionate racial

cordingly, they bear a "heavy burden of justification" (*Loving* v. *Virginia*, *supra*, 388 U.S. at 9), and will be upheld only where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964).

That heavy burden cannot be met by merely *asserting* a substantial legitimate purpose—such as preventing overcrowding and segregation in the school system. As this Court observed in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 (1975): "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying [the challenged classification]." A racial classification that purports to be remedial or well-intended may be in fact the product of invidious intent, as traditional racial classifications have been. *Fullilove* v. *Klutznick*, *supra*, slip op. 2–3 (opinion of Marshall, J.); *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 356–358 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 173–174 (1977) (Brennan, J., concurring).[27] Instead, the Board must demonstrate that its asserted objective was its actual objective. In addition the Board must demonstrate that this objective could not be accomplished by less discriminatory alternatives. *Loving* v. *Virginia*, *supra*, 388 U.S. at 11; *Lee* v. *Nyquist*, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (three-judge court), aff'd, 402 U.S. 935 (1971).

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impact but do not on their face involve considerations of race. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

[27] This case does not present the question, and the Court accordingly need not consider, the appropriate standard of review for race-conscious programs that disadvantage nonminorities. Compare *Regents of the University of California* v. *Bakke*, *supra*, 438 U.S. at 299 (opinion of Powell, J.) with *id.* at 356–362 (opinion of Brennan, White, Marshall, and Blackmun, JJ.); and compare *Fullilove* v. *Klutznick*, *supra*, slip op. 40 (opinion of Burger, C.J.) with *id.* slip op. 3 (opinion of Marshall, J.). Earlier cases (*e.g.*, *Bolling* v. *Sharpe*, *supra*, 347 U.S. at 499) state simply that racial classifications are suspect and require strict scrutiny; but those cases all concerned classifications that excluded or otherwise burdened members of historically disadvantaged minority groups—the kind of exclusion involved here.

While both voluntary and court-ordered desegregation plans require consideration of race (*McDaniel* v. *Barresi*, 402 U.S. 39, 41 (1971)), most such plans are not presumptively invalid because, unlike the plans here, (1) they result in a net decrease in segregation in the school system generally, without shifting black students from integrated to segregated schools and (2) they affect whites as well as blacks.[28] Even under the most exacting standard, properly designed voluntary desegregation plans can withstand judicial scrutiny. See, e.g., *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705 (2d Cir. 1979) (discussed *infra*, pages 30–31). Many different race-conscious measures that do not contain the exclusionary and segregative features of the plans at issue here have been successfully used to promote integration.[29]

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[28] Although students have no absolute right to attend a particular school, *McDaniel* v. *Barresi*, *supra*, 402 U.S. at 42, they have a right not to be singled out for disadvantageous treatment on the basis of their race, absent justification. *Hunter* v. *Erickson*, *supra*. For this reason, a desegregation plan that imposes a disproportionate burden of integration on a particular racial or ethnic group must be justified by school authorities. See, *e.g.*, *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042 (6th Cir.), cert. denied, 434 U.S. 997 (1977); *Arvizu* v. *Waco Independent School District*, 495 F.2d 499, 504–507 (5th Cir. 1974); *Clark* v. *Board of Education*, 449 F.2d 493, 499 (8th Cir. 1971), cert. denied, 405 U.S. 936 (1972); *Lee* v. *Macon County Board of Education*, 448 F.2d 746, 753–754 (5th Cir. 1971); *Felder* v. *Harnett County Board of Education*, 409 F.2d 1070, 1074 (4th Cir. 1969). The courts examine both the validity of the school board's justification for the proposals and the availability of feasible alternatives. See, *e.g.*, *Arvizu* v. *Waco Independent School District*, *supra*; *Moss* v. *Stamford Board of Education*, 350 F. Supp. 879 (D. Conn. 1972). Because the plans at issue here impose a far greater injury—that of segregation—it is unnecessary to decide whether the plans would satisfy constitutional requirements if they only had the effect of removing minority students from their local integrated schools.

[29] See, *e.g.*, *Martin* v. *Charlotte-Mecklenburg Board of Education*, No. 79-1586 (4th Cir. July 23, 1980) (pupil reassignment plan to prevent any school in school system from exceeding 50% minority enrollment); *Parent Association of Andrew Jackson High School* v. *Ambach*, *supra* (transfer option for minority students attending all-minority high school to high schools exceeding 50% white); *Zaslawsky* v. *Board of Education*, 610 F.2d 661 (9th Cir. 1979) (faculty integration plan requiring faculty at every school in district to be within 10% of the district-wide average of 30% minority) *Darville* v. *Dade County School Board*, 497 F.2d 1002 (5th Cir. 1974) (clustering of three junior high schools to maintain racial balance); *Higgins* v. *Board of Educa-*

Moreover, this Court has expressly approved a number of "desegregation tools" requiring consideration of race, including realignment of attendance zones, pairing or clustering of both contiguous and noncontiguous attendance zones, student reassignment and transportation, and majority-to-minority transfer provisions. *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 26–31. Additional techniques include magnet schools,[30] relocation of portable classroom units, school consolidation, construction of new school buildings, and school closings. *Cisneros* v. *Corpus Christi Independent School Dist.*, 467 F.2d 142, 152–153 (5th Cir. 1972). See also 20 U.S.C. 1713.

The enrollment quota plans at issue here differ in significant respects from those types of permissible race-conscious measures and, instead, bear striking resemblances to the student transfer program condemned by this Court in *Goss* v. *Board of Education*, 373 U.S. 683 (1963). In *Goss*, black students challenged a transfer policy adopted by the school board as part of its desegregation plan. The policy permitted a pupil to transfer from a school in which his race was in the minority to a school

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tion, 508 F.2d 779 (6th Cir. 1974) (selection of sites for new schools which maximized integration); *Pride* v. *Community School Board*, 488 F.2d 321 (2d Cir. 1973) (reassignment of minority students from segregated schools to majority race schools); *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), cert. denied, 402 U.S. 944 (1971) (integration of public school faculties); *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965) (board resolution to adopt plan to integrate students); *Guida* v. *Board of Education*, 26 Conn. Supp. 121, 213 A. 2d 843 (1965) (pairing of two junior high schools to maintain racial balance); *Balaban* v. *Rubin*, 14 N.Y. 2d 193, 199 N.E. 2d 375 (1964), cert. denied, 379 U.S. 881 (1964) (rezoning to racially balance new junior high school); *Morean* v. *Board of Education*, 42 N.J. 237, 200 A. 2d 97 (1964) (junior high student assignment plan designed to maximize racial balance).

[30] Magnet schools are designed to attract students to a school because of special career, vocational, or other programs offered. They generally recruit students on a systemwide basis and use admission goals to maintain racial balance. Although magnet schools by themselves are normally not sufficient to desegregate an entire school system, they have been successfully used in a number of cities to attract students of all races to a particular school. See, *e.g.*, *Tasby* v. *Estes*, 572 F.2d 1010, 1014 n.12 (5th Cir. 1978), cert. dism., Nos. 78–253, 78–282, 78–283 (Jan. 21, 1980); *Morgan* v. *Kerrigan*, 530 F.2d 401, 410 (1st Cir. 1976).

where his race was in the majority. The plaintiffs argued that the transfer policy was unconstitutional because it was based solely on racial factors that inevitably led to segregation. Viewing the plan as not only an inadequate remedy for *de jure* segregation but also an independent violation of the Fourteenth Amendment, the Court agreed, explaining (373 U.S. at 688-689):

> The recognition of race as an absolute criterion for granting transfers which operate only in the direction of schools in which the transferee's race is in the majority is no less unconstitutional than its use for original admission or subsequent assignment to public schools.
>
> * * * * *
>
> [N]o official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment.

As we show in Section B below, the enrollment quota plans are express racial quotas that have foreseeably led to the exclusion of black students from their local, integrated schools and their diversion to virtually all-minority schools. As we show in Section C, this foreseeable result, together with evidence of less discriminatory alternatives that the Board has not considered, is fatal to the Board's efforts to overcome the presumption of invalidity attending its exclusionary racial quotas.

B. *The Enrollment Quotas Are Presumptively Invalid Express Racial Classifications that Exclude and Segregate Substantial Numbers of Minority Students*

Both lower courts acknowledged that the enrollment quotas imposed at Gage Park and Morgan Park are express racial classifications, purposefully designed to exclude black students, but not whites, from the two high schools (Pet. App. A7, A20, A36). To achieve the Board's stated purpose of preventing the enrollments at the schools from becoming increasingly black, the quotas for black students were necessarily set at a lower level than the anticipated black enrollment at each school.

The enrollment quotas here differ from the systemwide race-conscious plans which this Court approved in *Swann*

v. *Charlotte-Mecklenberg Board of Education*, *supra*, and *McDaniel* v. *Barresi*, *supra*, 402 U.S. at 41, because the quotas not only excluded black students from their integrated "neighborhood" schools but resulted in their attending all-minority schools. They are therefore not mere "reassignment[s]" of students within the system (Pet. App. A25; see also Op. Cert. 17–19). Between 1975 and 1977, more than 1630 black students were denied admission to Gage Park and Morgan Park under the plans. During the first two years of their operation, virtually all of the excluded black students attended nearby predominantly minority schools (many of which were overcrowded) rather than the six PTP high schools with significant white enrollments on the north side of the city. Even after the Board provided bus transportation to the northside receiving schools and expanded the number of receiving schools from six to ten, the vast majority of excluded students attended all-minority schools instead. They were excluded not only from Gage Park and Morgan Park but from other nearby integrated schools as well. Thus, the plans both were intended to exclude blacks, but not whites, from their integrated neighborhood schools and resulted in a segregated education for a substantial number of those excluded.

There is no merit to the Board's suggestion (Op. Cert. 10–11) that the plans do not segregate or discriminate against excluded students because, according to the findings of the courts below (Pet. App. A18, A48), these students have "[a] guaranteed, meaningful opportunity to attend high school in an integrated setting." Under the transfer program then in effect, the closest white or integrated alternative school was 11.4 miles from Gage Park and 18.15 miles from Morgan Park. Three of the four alternative schools added in 1977 were equally distant. The fourth, Curie, is within two miles of Gage Park but it has a partial racial quota, under which only 50 black or Hispanic students from Gage Park, and 50 black students from Morgan Park may attend, and the district court made no findings on the Board's justification for this restriction on minority enrollment. The Board offered no evidence to show it had any realistic expectation that, in light of the transportation times and distances involved, the northside schools would ever attract students of any race from Gage

Park or Morgan Park. *Cf. Tasby* v. *Estes*, 572 F.2d 1010, 1014 (5th Cir. 1978), cert. dism., Nos. 78–253, 78–282, 78–283 (Jan. 21, 1980); *Mims* v. *Duval County School Board*, 329 F. Supp. 123 (M.D. Fla.), 447 F.2d 1330 (5th Cir. 1971). Moreover, the low participation rate in the transportation program (102 students out of 1630 in 1977) suggests that the "option" to attend a white or integrated school was more theoretical than real. On this record, the finding of a meaningful opportunity to attend an integrated school was clearly erroneous.[31]

Even if the opportunity provided was "meaningful," the mere provision of such an opportunity in the circumstances here does not reduce or justify the injury to black students who, as a result of their racially-based exclusion from Gage Park and Morgan Park, attended all-minority schools. No such choice was required of white students. The injury that flows from a racially exclusionary educational system was well documented in *Brown I*, *supra*. And it is settled that a school board may not shift responsibility for segregative policies to students and their parents by relying on freedom of choice or free transfer provisions. *Green* v. *County School Board*, 391 U.S. 430; *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *see also Goss* v. *Board of Education*, *supra*. While those cases examined transfer plans as remedies for a racially dual school system, their reasoning applies equally where authorities have excluded black students from an integrated school and offered them a free choice between nearby convenient segregated schools and distant white or integrated ones. In sum, when the Board has excluded black students from an integrated school, it cannot properly rely on the students to remedy the deficiencies in its plans by exercising the most difficult options offered them.

C. *The Board Has Failed to Rebut the Presumption that the Quota Plans Are Invidiously Discriminatory*

As we have argued above, the fact that the quotas are express racial classifications that exclude and segregate black students raises a rebuttable presumption that they

[31] Where, as here, a district court bases its finding solely on written evidence, the reviewing court is not constrained by the clearly erroneous standard. *Nash* v. *Estelle*, 597 F.2d 513, 518 (5th Cir. 1979) (en

are the product of invidious intent. The court of appeals concluded in effect (Pet. App. A20–A26) that the Board successfully rebutted this presumption by demonstrating (1) that the Gage Park and Morgan Park areas were undergoing demographic change, (2) that, because of this and because of the phenomenon of "white flight," a failure to impose quotas like those at issue would result in the transformation of Gage Park and Morgan Park into segregated black schools, and (3) that the excluded students were offered a "viable opportunity" to attend integrated high schools.

The problem with the court's analysis lies not in its assumption that school officials may take account of the possibility of "white flight" and the practicalities of achieving racial stability. These factors may properly be considered by a board of education in choosing between effective desegregation plans (see *Adams* v. *United States*, No. 79–1468 (8th Cir. Mar. 3, 1980) (en banc), petition for cert. pending, No. 79–1752; *United States* v. *School District of Omaha*, 521 F.2d 530, 546–547 (8th Cir.), cert. denied, 423 U.S. 946 (1975)) and in adopting voluntary plans to promote integration (*Parent Association of Andrew Jackson* v. *Ambach*, *supra*, 598 F.2d at 719). But just as the possibility of "white flight" cannot justify a failure to eliminate *de jure* segregation (*Monroe* v. *Board of Commissioners*, *supra*, 391 U.S. at 459; *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490–491 (1972)), adverse public reaction to increasing minority enrollments cannot justify a plan that segregates or discriminates against minorities. As Judge Sobeloff stated in his concurrence in *Brunson* v. *Board of Trustees*, 429 F.2d 820, 827 (4th Cir. 1970) (en banc): "The force of [*Monroe*] is inescapable: dissidents who threaten to leave the system may not be enticed to stay by the promise of an unconstitutional though palatable plan." See also *Morgan* v. *Kerrigan*, 530 F.2d 401, 420–422 (1st Cir. 1976).

The problem lies, instead, in all that the court of appeals failed to take account of. First, it has failed to give serious consideration to the question of the Board's intent. Rather, the court stated in conclusory terms (Pet. App.

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banc). But even assuming that the clearly erroneous standard applies, it has been met in this case.

A22) that there was "no basis in the record to support the contention that the racial quotas imposed were intended to retard integration and to create racial imbalance at these two high schools" and that it was "evident that the Board's voluntary action was motivated by a good faith effort to promote integration not only at these two high schools but also at the alternative high schools designated under the Plans."

Second, the court's conclusion is predicated on what we have shown (pages 20–21, *supra*) to be the incorrect assumption that the excluded black students had a meaningful opportunity to attend integrated schools elsewhere.

Finally, although it paid lip service (Pet. App. A20, A26–A27) to the principle that the exclusion of black students from the two schools could be justified only if no less discriminatory alternative was available, the court did not explain its reasons for concluding that there were no such alternatives. Indeed, it simply deferred (Pet. App. A27) to "the discretion of local school authorities" regarding what it characterized as "the mechanics of integration." It thereby avoided confronting evidence that bore not only on the question of the existence of less discriminatory alternatives but also on the question of the Board's intent. That evidence, as we show below, is fatal to the Board's attempt to rebut the presumption that its racial quotas for Gage Park and Morgan Park are invalid under the Equal Protection Clause.

1. *The Board has not shown that the actual objectives of the quota plans are to prevent overcrowding and promote integration*

The court of appeals focused most of its attention on the effects of the plans on the racial composition of Gage Park and Morgan Park and largely ignored the complex of decisions made by the Board with respect to the options open to the excluded black students. Similarly, although it noted (Pet. App. A20) that "alleviation of overcrowding" was one of the Board's asserted reasons for proposing the quota plans, it failed to examine the credibility of that assertion—a matter that would obviously throw light on the Board's *bona fides*.[32]

[32] We agree with the court of appeals insofar as it considered only the asserted objective of promoting integration as a compelling gov-

The Board's decisions with respect to the options to be provided the displaced black students reveal a pattern that not only fails to rebut the presumption of invidious intent but actually confirms an invidious intent (1) to leave excluded black students to their own devices, whether or not that effectively consigned them to all-minority schools, (2) to avoid requiring any white students to share burdens imposed on black students in connection with the attempt to stabilize white enrollment at the two schools, and (3) to preserve large white majorities in schools in the vicinity of Gage Park and Morgan Park. Despite the Board's ostensible goal of promoting integration, it proceeded in a manner that virtually guaranteed that a majority of the excluded black students would end up attending nearby virtually all-minority schools. The foreseeability of this result is strong evidence of invidious intent. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 536 n.9 (1979) ("Dayton II"); *Personnel Administrator of Massachusetts* v. *Feeney*, *supra*, 442 U.S. at 279 n.25. In addition, the many inconsistencies between details of the plans' operation and supposedly normal Board policies are indicative of discriminatory intent. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).[33]

With respect to options *within* the Gage Park attendance areas, the Board never explained why, if it was pursuing a policy of promoting racial integration, it continued to tolerate the racial separation among ninth graders in the Morgan Park attendance area, *i.e.* a Clissold branch ninth grade class that was 94.8% white in 1976 and a ninth grade class in the main building that was 68% black (see page 5 & note 13, *supra*). Adherence to the Board's neighborhood school policy can hardly be the justification since that policy obviously did not operate in the case of

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ernmental interest that could justify the racial quotas (Pet. App. A20–A21, A25–A26). While the prevention of overcrowding in schools is a legitimate, even laudable governmental objective, it is not generally permissible to use racial quotas to achieve it.

[33] *Arlington Heights*, of course, concerns standards for determining whether classifications that have racially disproportionate impact but do not on their face involve racial considerations are invidious; but this proposition applies *a fortiori* with regard to attempts to rebut a presumptively invalid racial classification.

the black students excluded from Morgan Park and Gage Park.

With respect to schools outside Gage Park and Morgan Park, the Board's policies are even more bewildering if the Board's explanation of the objectives of its quota plans is to be taken at face value. As originally implemented, the plans consigned the excluded students to choices among 18 "underutilized schools" available under the preexisting Permanent Transfer Program (PTP) that allowed transfers without respect to the impact on the racial composition of receiving schools. The chances that substantial numbers of the excluded students would attend the white or integrated schools on the list were minimized by several factors. Only at 11 all-minority schools were certain numbers of the excluded students *guaranteed* admission (in contrast to the other schools on the list, to which students could be admitted only until the school reached capacity) (page 7, *supra*). Moreover the white or integrated schools on the list were northside schools at considerable distances from Morgan Park and Gage Park, reachable only by a series of connections on public transit, and the Board had not troubled itself to inquire into distances and travel times, provide bus transportation, or even offer reimbursement for carfare (page 8, *supra*). Only after petitioners filed these suits did the Board provide bus transportation.

The Board's ostensible reason for denying the excluded students the opportunity to attend nearby white and integrated schools was that they were overutilized. But this explanation was undercut by several circumstances: (1) the Board could have coped with the overcrowding by the use of more mobile classrooms or by devising quotas for those schools effectively limiting the numbers of white students there, instead of imposing barriers to the admission of these black students; (2) the Board expressly authorized excluded black students to attend overutilized technical schools that were virtually all-minority (see page 7, *supra*); and (3) the Board apparently did not effectively *enforce* its ostensible policy against overcrowding in overutilized minority schools not on the PTP list, for more than 400 excluded students attended such schools (see pages 8–9, *supra*), including Harper (No. 44), a school attended in 1975 and 1976 by 200 out of 855 excluded Gage Park stu-

dents, with the encouragement of the Gage Park principal (see note 20, *supra*).

The most noteworthy exception to the Board's asserted policy of directing students to schools where they would not create or exacerbate overcrowding problems was, however, its treatment of Curie (No. 33), a school that in 1976 had a white enrollment of 75.7% and a utilization level of 87.7% and that was near Gage Park (App. A and App. B, *infra*). When questioned concerning the Board's unwillingness as part of its 1977 modification of the quota plans to permit more than 100 black students from Morgan Park and Gage Park to attend Curie, even though those admissions would raise its utilization level to only 90%, the Board's counsel candidly stated that the numbers were restricted because "a large influx of minority students" would be "educationally disruptive" in the "highly volatile" area of Marquette Park, where Curie was located (A. 35-36). This is precisely the kind of official response to local prejudices that is *not* permissible. See, *e.g.*, *United States* v. *Scotland Neck City Board of Education*, *supra*, 407 U.S. at 491; *Morgan* v. *Kerrigan*, *supra*, 530 F.2d at 420-422. Moreover, reliance on that consideration condemns the decision to limit transfers to Curie, even if the Board also had other reasons for doing so. For as this Court observed in *Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, 429 U.S. at 265-266, official action will be found unconstitutional even where a discriminatory purpose was only one of several considerations motivating that action.

In sum, the evidence with respect to the plans' design and actual operation suggests that the Board undertook this particular piecemeal approach to stabilizing the racial composition of Gage Park and Morgan Park solely in response to attitudes in the white community there and elsewhere and not to provide education in an integrated setting for all the students there. For that reason, the Board eschewed a more comprehensive solution that would have avoided the segregation of a majority of the excluded black students and distributed the burden among black and white students alike. As we show below, a number of such solutions were available.

2. *The Board failed to demonstrate that its asserted objectives could not be achieved by less discriminatory alternatives*

Even assuming that the Board's asserted objectives of preventing segregation and overcrowding were its actual purposes, the Board must nevertheless demonstrate that its objectives could not be accomplished by less discriminatory alternatives. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *Lee* v. *Nyquist*, 318 F. Supp. 710, 720 (W.D.N.Y. 1970) (three-judge court), aff'd, 402 U.S. 935 (1971). The Board has a heavy burden of justifying plans that purposefully exclude and segregate some minority students, even if they were designed to preserve integration for others.

The Board failed to carry that burden in this case. The Board presented no expert testimony on the need for the plans, their efficacy, or the selection of the particular quota levels set for each school. Although alternative means were suggested by black parents at Morgan Park at the time the plans were originally proposed (page 6, *supra*), the Board gave no serious consideration to these alternatives and instead implemented plans that had the adverse consequences predicted by black parents.

In 1977, after the district court stated that the plans were unconstitutional, petitioners suggested a number of alternative means of preserving integrated student bodies at Gage Park and Morgan Park High Schools, including a proposal to pair Gage Park with Curie, a predominantly white school located two miles from Gage Park. As noted above, the Board's counsel rejected the proposal because of a feared adverse reaction by white residents of Marquette Park, Curie's attendance area. A second proposal, the pairing of Morgan Park and Washington, was stated to be unacceptable because it would involve continued use of mobile classroom units, which are already widely used in the Chicago public school system. Neither of these reasons is sufficient, on this record, to satisfy the Board's burden of demonstrating that these less discriminatory alternatives are not feasible.[34]

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[34] It may be true, as respondents argue (Op. Cert. 11), that pairing Gage Park and Curie is presently not as attractive as it was in 1975–1977 because Curie's minority enrollment as of October, 1979 has in-

Rather than attempt to prove that it gave adequate consideration to alternative means of stabilizing enrollments at the two schools, the Board argues, and the court of appeals found (Pet. App. A23), that "racial quotas are a necessary means of arresting *de facto* segregation in the public schools." But as our discussion above (pages 17–18, *supra*) indicates, school districts have successfully used a number of alternative desegregation techniques in a nondiscriminatory fashion to maintain racial balance and stabilize enrollments, including pairing, redistricting, and magnet schools.[35] Properly implemented, these techniques have the advantage of distributing the inconveniences of the plan on an equitable basis among different racial groups. Even more important, they do not move substantial numbers of black students from integrated to segregated schools.

With respect to enrollment quotas in particular, an important distinction exists between their use at only one or two neighborhood schools and their use as part of a comprehensive desegregation plan.[36] In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), the Court approved racially-based attendance assignments in which "each school" in the system had "a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." The use of enrollment quotas as part of a systemwide desegregation plan

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creased to 40%. But while Curie's current minority enrollment may bear on alternatives now available to the Board, it does not excuse the Board's failure to consider pairing in 1975 or its rejection of this specific proposal in 1977, when Curie's enrollment was 73.2% white. Significantly, two of the northside schools selected by the Board to receive excluded students—Lake View (No. 7) and Senn (No. 66)—had minority enrollments exceeding 50% in 1975 and 1976 (Pet. App. 41A).

[35] Chicago's experience with Young, a city-wide magnet high school (see note 12, *supra*), demonstrates that magnets can be successfully used in Chicago to attract students of all races to a particular school. Unlike the enrollment quotas at Gage Park and Morgan Park, the quotas at Young do not deprive any students of their neighborhood school options and do not enhance existing segregation. Whites as well as blacks are excluded by the enrollment quotas at Young (Op. Cert. 12; R. 13, attachment 1.).

[36] As our discussion of such desegregation measures as pairing proposals indicates, we do not contend that *only* a systemwide plan would, on this record, satisfy constitutional requirements.

presents at least three advantages over their use in this case. First, if they are imposed at every school, enrollment quotas will not have a discriminatory impact on one particular racial group.[37] Second, a properly designed systemwide desegregation plan reduces racial isolation in the school system as a whole, rather than shifting racial imbalance from one set of schools to another.

Finally, a systemwide approach ensures that the school authorities have fully considered the impact of their actions beyond the particular schools that are the subjects of those actions. *Keyes* v. *School District No. 1*, 413 U.S. 189, 203 (1973). In Chicago, where more than 75% of the students are minority, a policy of focusing only on preserving racial balance in some schools will increase the likelihood that other schools in the system will be segregated. In school districts with small white enrollments, an adequate desegregation plan need not necessarily distribute white students equally throughout the public schools if such action would impair racial stability. *Tasby* v. *Estes*, *supra*, 572 F.2d at 1013; *Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975); *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211, 1221 (5th Cir. 1970) (en banc). Nevertheless, the implications of such decisions for the school system as a whole must be considered and justified. Cf. *Lee* v. *Macon County Board of Education*, No. 79-2499 (5th Cir. May 7, 1980), slip op. 5403; *United States* v. *Texas Education Agency*, No. 78-2526 (5th Cir. Aug. 9, 1979), slip op. 6806.[38]

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[37] See, *e.g.*, *Linker* v. *Unified School District No. 259*, 344 F. Supp. 1187 (D. Kan. 1972), aff'd in unpublished opinion, *sub. nom. Farha* v. *Unified School District No. 259* (10th Cir. No. 72-1691, May 31, 1973), cert. denied, 414 U.S. 1092 (1973), where the court approved a desegregation plan for elementary schools in Wichita, Kansas, which used a lottery to select students for reassignment to achieve racial balance. The court specifically rejected the argument that the plan selected children in an arbitrary and capricious manner in violation of the Fourteenth Amendment because "*all* elementary students in District 259 were subjected to the lottery." *id.* at 1201 (emphasis in original).

[38] Respondents note (Op. Cert. 10, 12) that as of March 1980, the Board expanded the list of available receiving schools to include five white or integrated schools on the south side of Chicago. This modification, which presumably becomes effective in September 1980, is not in the record considered by the courts below. Moreover, the Board has

Parent Association of Andrew Jackson v. *Ambach*, 598 F.2d 705 (2d Cir. 1979), provides one illustration of the permissible use of enrollment quotas on a systemwide basis. There the New York City Board of Education voluntarily adopted a plan to desegregate an all-minority high school. The plan gave all students attending the school the option of attending any high school in the city with a white enrollment exceeding 50% or the borough's average white enrollment, whichever was higher. Minority enrollment at the receiving schools was limited by a set of quotas designed to prevent any one receiving school from changing rapidly from white to black as a result of the integration program.[39] The purposes of the quotas were to preserve integration in as many schools as possible and to maintain white enrollment in the school system as a whole, and the Second Circuit properly held that racial quotas could be used in such a comprehensive effort to prevent resegregation of the school system.

The quotas used in *Andrew Jackson* were structured differently from those imposed here. Since they were applied on a systemwide basis, they resulted in a net increase in integration without creating additional segregation in the process. Students who were not able to opt out of Jackson because of the quotas were provided enriched academic and vocational programs. 598 F.2d at 712 n.3. Here, in contrast, the quotas shift racial imbalance from Gage Park and Morgan Park to the receiving schools.

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not shown that students excluded by the quotas can reasonably be expected to attend these schools or that this modification completely and irrevocably eradicates the effects of the alleged violation. *County of Los Angeles* v. *Davis*, 440 U.S. 625 (1979). Even if some excluded students attend these integrated schools, the Board still must justify both its objectives and its chosen means.

[39] Minority students from Jackson could not attend a receiving school if admission of such students, combined with admission of minority students from other integration programs or through demographic changes in the school's attendance area, (a) decreased the receiving school's white-minority balance by 40% in any one school year or (b) produced a change in that balance that exceeded " 'one-fourth of the difference between the school's current white enrollment and a 50% white enrollment,' whichever is less." 598 F.2d at 712. Although the court of appeals approved the Board's goal of preserving integration in the system as a whole, the case was remanded for further justification of the particular quota levels selected.

Rather than assisting minority students in opting out of a segregated environment, the plans actively discriminate against minorities by excluding them (but not their white neighbors) from their neighborhood schools and placing most of them in virtually all-minority ones. The plans are therefore impermissible under the Equal Protection Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

1975 AND 1976 ENROLLMENT AND PERCENT OF PERMANENT CAPACITY[1] FOR CHICAGO PUBLIC HIGH SCHOOL FACILITIES[1]

District		1975 Enrolment	1975 Percent of Cap.	1976 Enrolment	1976 Percent of Cap.
1	*Roosevelt (No. 1)[2]	1756	96.8	1880	103.6
	Taft (No. 2)	3204	99.8	3250	105.8
	*Van Steuben (No. 3)	1072	86.5	1049	91.0
2	*Mather (No. 4)	1622	93.0	1674	95.9
	*Sullivan (No. 5)	1365	95.5	1397	99.6
3	Amundsen (No. 6)	1746	104.2	1818	108.5
	*Lakeview (No. 7)	2093	98.3	2114	101.0
	Lane Tech (No. 8)	5138	100.4	4908	95.9
4	Austin (No. 9)	3298	119.7	3389	122.9
	Austin Branch (No. 10)	921	103.5	1087	124.5
	Steinmetz (No. 11)	2763	116.4	2750	115.9
5	Foreman (No. 12)	1828	127.8	1786	127.4
	Kelvyn Park (No. 13)	1620	118.6	1690	126.1
	Schurz (No. 14)	3994	101.3	4096	103.9
	Prosser Voc. (No. 15)	1459	104.5	1519	108.8
6	Clemente (No. 16)	4014	114.7	4366	92.7
	*Wells (No. 17)	1817	96.4	1974	104.7
7	Metro (No. 18)	341	68.2	351	70.2
	*Waller (No. 19)	1300	62.1	1333	63.7
	Jones Comm. (No. 20)	1067	101.3	1079	102.5
	Cooley Voc. (No. 21)	626	49.7	619	49.1
8	*Manley (No. 22)	1832	75.0	2004	82.0
	*Marshall (No. 23)	1621	60.3	1637	68.0
9	*Crane (No. 24)	2312	82.8	2390	85.6
	Young Magnet (No. 25)	1162	55.4	1791	82.8
	Cregier Voc. (No. 26)	800	109.7	834	114.4
10	*Farragut (No. 29)	3044	91.2	3138	88.1
11	Phillips (No. 30)	3056	100.7	3101	102.1
	Dunbar Voc. (No. 32)	2466	130.5	2464	130.4
12	Curie (No. 33)	3113	95.1	3154	87.7

[1] The sources of this data are Pltf. Ex. 14 (enrollment and percent of permanent capacity as of January 30, 1976) and Pltf. Ex. 15 (enrollment and percent of permanent capacity as of September 30, 1976). These exhibits do not provide permanent capacity figures for the following schools, which appear in Appendix B: Cregier Nursing, Simpson Family Living Center, Chicago Vocational Apprentice, and Washburne Trade.

[2] Schools marked with an asterisk appeared on the Board's PTP list of underutilized schools.

District		1975 Enrolment	1975 Percent of Cap.	1976 Enrolment	1976 Percent of Cap.
	Gage Park & Branch[3] (No. 34 & 35)	2441	106.0	2303	96.7
	Kelly (No. 36)	2417	138.5	2469	141.5
	Kennedy (No. 39)	2496	127.7	2427	110.4
13	*DuSable (No. 40)	2657	87.5	2810	92.6
14	*Hyde Park (No. 41)	1937	89.5	2433	112.4
	*Kenwood (No. 42)	1911	91.3	1923	91.8
15	Bogan (No. 43)	2738	130.4	2651	126.6
	Harper (No. 44)	2365	111.1	2459	115.5
	Hubbard (No. 45)	2311	127.3	2228	110.1
	Lindblom Tech (No. 46)	2535	117.0	2530	116.8
16	Harlan (No. 47)	3018	137.2	3050	138.7
	Chicago Voc. (No. 48)	4169	109.5	4125	108.4
17	Bowen (No. 50)	3284	101.2	3219	99.2
	Washington (No. 51)	2337	119.6	2263	115.8
18	Julian (No. 52)	1890	82.2	2487	100.4
	Morgan park (No. 53)	3323	128.6	2944	114.0
19	Collins (No. 55)	[4]	[4]	1038	58.3
	*Harrison (No. 56)	2557	83.3	2061	67.1
20	Calumet (No. 59)	3757	143.5	3698	141.3
	Simeon Voc. (No. 60)	1840	126.2	1890	129.6
21	Englewood (No. 61)	2315	79.0	2128	148.8
	Parker (No. 62)	2131	117.4	2291	126.2
22	Hirsch (No. 63)	1700	103.7	1720	104.9
	South Shore (No. 64)	3278	102.1	3408	106.1
23	King (No. 65)	2323	102.4	2413	106.3
24	*Senn (No. 66)	2508	89.8	2618	93.8
25	Orr (No. 67)	2274	98.9	2709	109.3
	Flower Voc. (No. 68)	879	72.4	903	74.3
	Westinghouse Voc. (No. 69)	1985	102.1	2000	102.9
26	*Tilden (No. 70)	2477	92.2	2747	102.2
	Richards Voc. (No. 71)	847	142.6	881	148.3
27	*Carver (No. 72)	2017	89.6	2073	91.4
	Corliss (No. 75)	1813	78.8	2477	100.0
	Fenger (No. 73)	3619	157.1	3575	162.6

[3] In 1975 and 1976, all ninth grade students attended the Gage Park "branch" which is on the same campus as the high school, is part of the permanent facility, and is used for ninth graders only (Stip. 6A).

[4] Figures unavailable.

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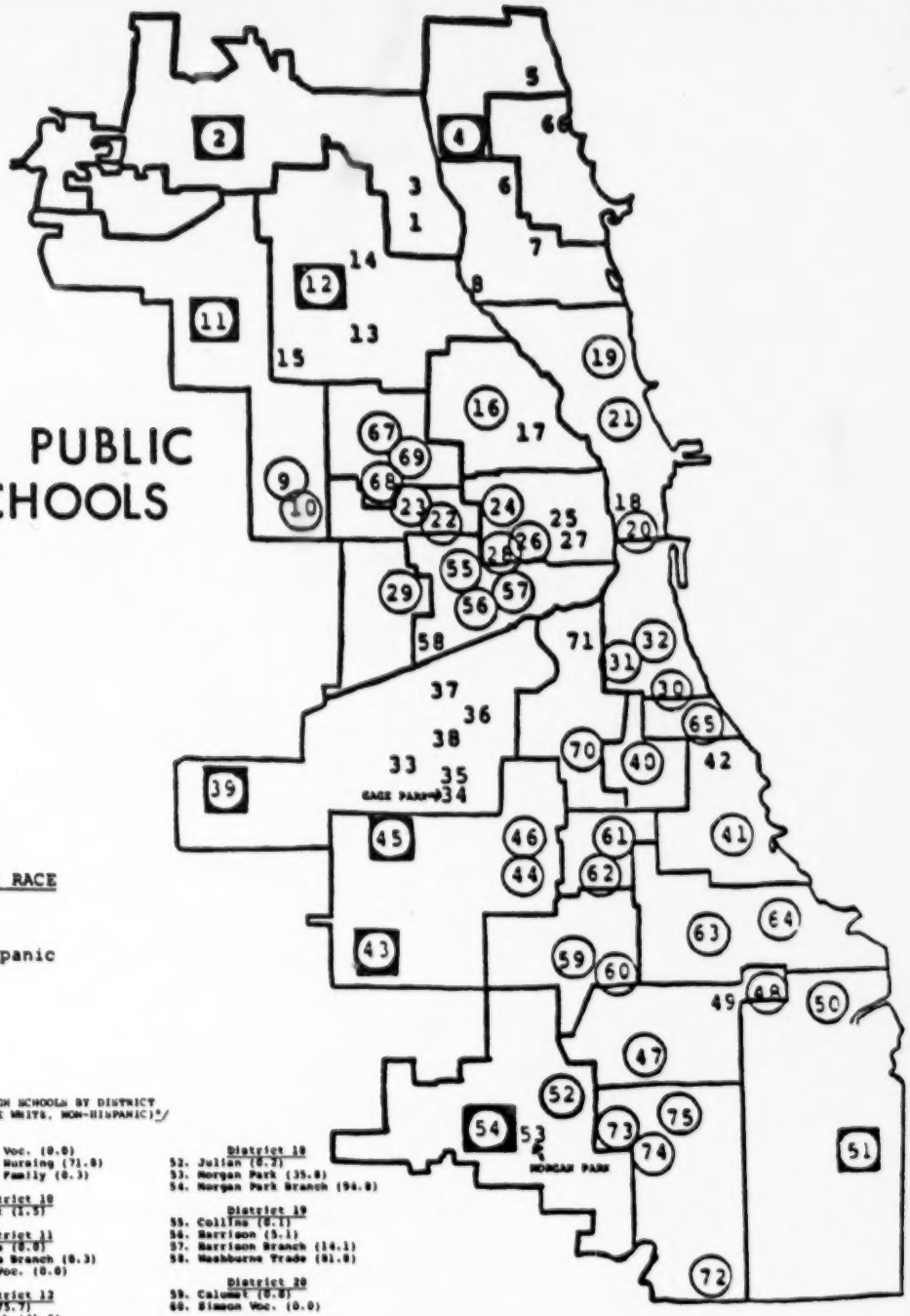
CHICAGO PUBLIC HIGH SCHOOLS



KEY TO 1976 ENROLLMENT BY RACE

(9) ▸ 85% minority

[11] ▸ 85% white, non-Hispanic

13 Other

CHICAGO HIGH SCHOOLS BY DISTRICT (PERCENTAGE WHITE, NON-HISPANIC)*/

District 1
1. Roosevelt (76.0)
2. Taft (90.8)
3. Von Steuben (63.2)

District 2
4. Mather (89.6)
5. Sullivan (73.4)

District 3
6. Amundsen (88.1)
7. Lakeview (43.6)
8. Lane Tech (75.0)

District 4
9. Austin (0.1)
10. Austin Branch (0.3)
11. Steinmetz (90.9)

District 5
12. Foreman (95.2)
13. Kelvyn Park (58.3)
14. Schurz (75.3)
15. Prosser Voc. (73.2)

District 6
16. Clemente (9.7)
17. Wells (16.3)

District 7
18. Metro (65.8)
19. Waller (9.1)
20. Jones Commercial (7.4)
21. Cooley Voc. (0.8)

District 8
22. Manley (0.8)
23. Marshall (0.0)

District 9
24. Crane (0.8)
25. Young Magnet (28.9)
26. Crosier Voc. (0.0)
27. Crosier Nursing (71.8)
28. Simpson Family (0.3)

District 10
29. Farragut (1.5)

District 11
30. Phillips (0.0)
31. Phillips Branch (0.3)
32. Dunbar Voc. (0.0)

District 12
33. Curie (75.7)
34. Gage Park (41.6)
35. Gage Park Branch (42.6)
36. Kelly (78.1)
37. Kelly Branch-Davis (67.2)
38. Kelly Branch-Gunsaulus (84.5)
39. Kennedy (69.0)

District 13
40. DuSable (0.0)

District 14
41. Hyde Park (0.0)
42. Kenwood (24.4)

District 15
43. Bogan (97.4)
44. Harper (0.0)
45. Hubbard (93.4)
46. Lindblom Tech (0.1)

District 16
47. Marian (0.0)
48. Chicago Voc. (0.5)
49. Chicago Voc. Appr. (62.5)

District 17
50. Bowen (3.6)
51. Washington (93.3)

District 18
52. Julian (0.7)
53. Morgan Park (35.8)
54. Morgan Park Branch (94.8)

District 19
55. Collins (0.1)
56. Harrison (5.1)
57. Harrison Branch (14.1)
58. Washburne Trade (81.8)

District 20
59. Calumet (0.8)
60. Simeon Voc. (0.0)

District 21
61. Englewood (0.0)
62. Parker (0.0)

District 22
63. Hirsch (0.0)
64. South Shore (0.1)

District 23
65. King (0.0)

District 24
66. Senn (44.0)

District 25
67. Orr (3.7)
68. Flower Voc. (0.0)
69. Westinghouse Voc. (0.0)

District 26
70. Tilden (11.1)
71. Richards Voc. (36.3)

District 27
72. Carver (0.0)
73. Fenger (0.6)
74. Fenger Branch-Curtis (0.6)
75. Corliss (0.0)

*/ This map was prepared by the United States and is derived from the following record sources: Plif. Ex. 2 (racial composition of each school), Plif. Ex. 11 (street addresses of the schools), and Plif. Ex. 36 (a map reflecting the locations of the public high schools and their racial compositions). The district lines, which do not appear in the record, were taken from a map showing the location of all public schools prepared in September 1978 by the Department of Facilities Planning of the Chicago Board of Education. This map was obtained from the Board by the Department of Health, Education, and Welfare in the course of its investigation in 1977 and 1978 of the city's eligibility for federal funding; this map, along with the street addresses, also provided the source for the relative locations of 9 schools (mainly branches) not appearing on Plif. Ex. 36.